SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 662

ROSE KIMEN, PETITIONER,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO

ON WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FEBRUARY TERM, A. D. 1934.

ROSE KIMEN
Defendant in Error,
vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO,
a Corporation,
Plaintiff in Error.

TRANSCRIPT OF RECORD.

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1 PLACITA.

3 Praecipe, filed August 19, 1930.

5 Summons issued August 19, 1930.

7 Declaration filed September 5, 1930, contains the common counts and the following special count:

8 "For That Whereas, Also, the defendant, Atlas Exchange National Bank of Chicago, a corporation, on to-wit: November 2, 1929, at Chicago, Illinois, offered to sell to this plaintiff Rose Kimen, four thousand ($4,000) dollars First National Company Collateral

Trust, Series "O" First Mortgage Real Estate 5½% Gold Bonds in denomination of one thousand ($1,000) dollars each, and then and there promised that if this plaintiff purchased said bonds and paid therefor the sum of four thousand ($4,000) dollars, together with the accrued interest thereon, it, the defendant, would repurchase from the plaintiff the said bonds at maturity paying therefor par value of the bonds and accrued interest thereon; and the plaintiff, in consideration thereof did, on, to-wit: November 2, 1929, pay to the said defendant the sum of to-wit: four thousand ($4,000) dollars, and purchased from the defendant the said bonds, and in evidence of the promise and agreement entered into by the plaintiff and the defendant, the said defendant reduced its said agreement into writing, and as an inducement to the plaintiff to purchase said bonds from the said defendant, and as a further consideration thereof, the said defendant delivered to the plaintiff in writing its promise to re-purchase the said bonds as aforesaid, which agreement is in words and figures as follows, to-wit:

Daniel M. Healy, President,
Daniel J. Healy,
Vice-Pres.

J. H. Jones, Vice-Pres.
M. F. Schiavone,
Vice-Pres.

P. Malakates, Vice-Pres.
E. M. Blankenheim,
Cashier.

E. J. Nordholm, Asst.
Cashier.

ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO
Capital and surplus $240,000
Chicago, Ill.

November 2, 1929.

Rose Kimen,
Chicago, Ill.

Dear Madam:

This is to acknowledge that we have this day sold you four thousand ($4,000) dollars, par value First National Company, collateral Trust, First Mortgage, series "O" Real Estate 5½% Gold Bonds in denomination of $1,000 each, numbered 4595-4596-4599 and 4600.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $4,000 and accrued interest.

Yours very truly,
B. M. Blankenheim,
Cashier.

B.M./GD

Member
Federal Reserve System

Chicago Clearing
House Association

That said bonds above mentioned matured on, to-wit, July, 1930, that this plaintiff presented said bonds to the defendant, on, to-wit, July 15, 1930, and demanded that it repurchase the same and pay this plaintiff the sum of four thousand ($4,000) dollars and the accrued interest due on said bonds; that the defendant refused to repurchase said bonds, and although this plaintiff has made repeated demands subsequent to July 15, 1930, upon the defendant to repurchase the said bonds in accordance with said agreement, yet the defendant, though requested, has not paid the sum of $4,000 and accrued interest, or any part thereof to the plaintiff, but refuses so to do; to the damage of the plaintiff of $5,000 and therefore she brings her suit, etc.

ROSE KIMEN, *Plaintiff*,
By HUME & KENNEDY,
Her Attorneys."

(Reverse Side.)

PLAINTIFF'S AFFIDAVIT OF AMOUNT DUE.

State of Illinois, }
County of Cook. } ss.

THOMAS C. KENNEDY, being first duly sworn, says:

That the demand of the plaintiff in the above entitled cause is for the sum of four thousand two hundred and fifty ($4,250) dollars, due and owing from the defendant to the plaintiff under its written agreement dated November 2, 1929, and that there is due to the plaintiff from the defendant after allowing to it all just credits, deductions and set-offs, four thousand two hundred and fifty ($4,250) dollars.

THOMAS C. KENNEDY.

Subscribed and sworn to before me, this 4th day of September, 1930.

(Seal) KENNETH E. MOBERLEY."

11 Appearance and demand for jury by Elbridge W. Rice, attorney for defendant, Atlas Exchange National Bank.

15 Plea filed September 10, 1930:

And the defendant, by E. W. Rice, its attorney, comes and defends the wrong and injury, when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

Elbridge W. Rice,
Attorney for said Defendant.

State of Illinois, } ss.
County of Cook. }

Daniel M. Healy, being first duly sworn, deposes and says that he is president of the above named defendant and its duly authorized agent in this behalf; that there is not owing to plaintiff from defendant the sum of four thousand, two hundred fifty dollars ($4,250), or any other sum whatsoever; that said defendant did not enter into any agreement with plaintiff and never authorized or empowered anyone else to enter into the agreement alleged in said declaration or in the affidavit thereto attached.

Daniel M. Healy.

Subscribed and sworn to before me this 10th day of September, A. D. 1930.

Stephen L. Ruff,
Notary Public.

17 January 21, 1931, notice of placing case on trial calendar filed.

19 Withdrawal of Hume & Kennedy and substitution of Shulman, Shulman & Abrams as attorneys for plaintiff filed July 29, 1931.

21 Order for substitution of attorneys.

23 Notice of motion for leave to file additional plea filed October 15, 1931.

26 Additional plea of defendant filed October 15, 1931:

And for a further plea in this behalf, the defendant, by Elbridge W. Rice, its attorney, comes and defends the wrong and injury, when, etc., and says that it, said defendant, is a national bank, organized under the national banking laws of the United States of America; that neither its charter nor the said law gives to the defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation, or to repurchase bonds at maturity but requires that the defendant in buying and selling investment securities shall do so without recourse, and that the supposed guaranty or repurchase agreement of the said B. M. Blankenheim, cashier, as set forth in plaintiff's declaration is *ultra vires* and void, and this the defendant is ready to verify: wherefore, it prays judgment, etc.

Elbridge W. Rice,
Attorney for Defendant.

State of Illinois, }
County of Cook. } ss.

Daniel M. Healy, being first duly sworn, deposes and says that he is president of the above named defendant and its duly authorized agent in this behalf; that there is not owing to the plaintiff from defendant the sum of four thousand, two hundred fifty ($4,250) dollars, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of said defendant; that the said defendant never authorized or empowered anyone to execute the same; and that the said defendant, Atlas Exchange National Bank of Chicago is a corporation organized under the banking laws of the United States of America; and that under the provisions of said law the said defendant had no power or authority to enter into the said supposed agreement mentioned in plaintiff's declaration, and that such agreement is *ultra vires* and void.

Daniel M. Healy.

Subscribed and sworn to before me this 13th day of October, A. D. 1931.

Helen Hutchinson,
Notary Public.

29 Order entered October 15, 1931, granting leave to defendant to file additional plea and amended affidavit of merits.

31 Replication to additional plea filed October 21, 1931.

33 Additional count filed by plaintiff October 26, 1931, as follows:

Defendant, Atlas Exchange National Bank, on to-wit, November 2, 1929, at Chicago, Illinois, offered to sell to plaintiff four thousand ($4,000) dollars First National Company, Collateral Trust, Series "O" First Mortgage Real Estate 5½% Gold Bonds in denomination of one thousand ($1,000) dollars each, and then promsied that if plaintiff purchased said bonds and paid the consideration the defendant would repurchase from the plaintiff such bonds at maturity, paying therefor par value and accrued interest; that plaintiff in consideration thereof and conditional upon the agreement of the defendant to so repurchase did on November 2, pay to the defendant the sum of $4,004.47 and received said securities, and defendant did then and there deliver to plaintiff in writing its promise to repurchase which agreement is set out in the first count, which is hereby adopted and made a part hereof; that said bonds and securities matured on July 15, 1930, and plaintiff presented them to defendant, on to-wit: July 15, 1930, and demanded that
34 it repurchase said bonds, but defendant refused and still refuses and now claims that the agreement is prohibited by the National Banking Act, and that it had no right to execute the same, by reason whereof plaintiff tenders said bonds in open court and demands the return of the consideration paid plus accrued interest thereon from the date of sale, and that it thereupon became the duty of the defendant to repay the same, and although plaintiff has made repeated demands for same, yet the defendant refuses to do so and still refuses, to the damage of the plaintiff of five

thousand ($5,000) dollars, and she therefore brings this suit.

Schulman, Schulman and Abrams,
Attorneys for Plaintiff.

State of Illinois, }
County of Cook. } ss.

Rose Kimen, being first duly sworn, on her oath deposes and says that she is the plaintiff in the above entitled cause, and that the nature of her claim is for moneys had and received by the defendant from the plaintiff, as is more fully set out in the additional count to said declaration, and that there is due her from the defendant after allowing the defendant all its deductions or set-offs the amount of $4,002.47 plus interest at the legal rate from November 2, 1929.

Rose Kimen.

Subscribed and sworn to before me this 26th day of October, 1931.

Rose Reitenberg,
Notary Public.

36 Order entered October 26, 1931, granting leave to plaintiff to file additional count to her declaration.

38 Demurrer filed October 31, 1931, by defendant to plaintiff's additional count.

42 Order entered November 5, 1931, overruling plaintiff's demurrer to defendant's additional plea.

44 Pleas to additional count filed November 14, 1931. First plea general issue, second plea to additional count, that defendant is a national bank organized under the national banking laws of the United States of America; that neither its charter nor the said law

gives to the said defendant any power or authority in selling investment securities to enter into an agreement to repurchase the same at a subsequent date but requires that such securities be sold without recourse, and that the supposed repurchase agreement mentioned in plaintiff's additional count is *ultra vires* and void and this the defendant is ready to verify, etc.

45 Third plea to additional count—that defendant is a national bank organized under the national banking laws of the United States of America, and that the said national banking laws of the United States prohibit banks organized thereunder from selling investment securities unless they be sold without recourse, and that said repurchase agreement mentioned in plaintiff's additional count was in violation of the prohibition contained in said national banking act, and that the only benefit received by this defendant from the execution of said contract was the payment to it of one-half per cent of the face value of said bonds mentioned in said agreement or twenty ($20) dollars, and that this defendant received no other or further benefit therefrom and this the defendant is ready to verify; wherefore it prays judgment, etc.

46 Amended affidavit of merits:

Daniel M. Healy, being first duly sworn, deposes and says that he is the president of the above named defendant and is the duly authorized agent in this behalf; that there is not due or owing to the plaintiff from the defendant the sum of four thousand two hundred fifty ($4,250) dollars; that the supposed agreement set forth in the declaration is not the agreement of said defendant, and that the defendant never authorized or empowered anyone to execute the same; that the defendant is a corporation organized under the banking laws of the United States of America, and that under the provisions of said law said defendant has no power or authority to enter into the said supposed agreement mentioned in plaintiff's declaration, and that such agreement is *ultra vires* and void; that the only benefit received by the defendant on account of said contract is the sum of twenty ($20) dollars paid as the consideration for the excecution of the same.

48 Replications to the second and third pleas to the additional count filed November 25, 1931. Replication to the second plea to additional count states that if plaintiff was prohibited from buying and selling the securities involved and was not authorized by the national banking laws to enter into the agreement mentioned, then it ought to return the money received, together with interest, plaintiff offering to return the securities purchased. Replication to the third plea: Plaintiff says that if she was prohibited by the national banking laws from entering into the agreement then the money ought to be returned to the plaintiff, and that the benefits received by the defendant were not the sum of twenty ($20) dollars, but that it received the entire amount from the defendant as set forth in plaintiff's additional count, and that the defendant ought therefore to return the entire consideration received by it; that plaintiff hereby offers and tenders to return the securities purchased on the alleged illegal agreement, and this the defendant prays may be inquired by the country.

51 A verdict of the jury filed January 8, 1932, as follows:

We, the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of four thousand four dollars and forty-seven cents ($4,004.47) dollars, plus accrued interest.

53 Motion for new trial, January 8, 1932, by defendant.

55 January 27, 1932, order overruling motion for new trial. Motion in arrest of judgment by defendant. Order overruling motion. Judgment on the verdict against defendant for four thousand four dollars and forty-seven cents ($4,004.47). Exception by the defendant. Order allowing appeal to the defendant to the Appellate Court for the First District, State of Illinois, upon filing appeal bond in the penal sum of five thousand ($5,000) dollars within sixty days, and a bill of exceptions in ninety days.

55-B Motion entered by plaintiff to amend judgment.

57 Order amending judgment, as follows:

This cause coming on again to be heard upon the motion of the plaintiff by Schulman, Schulman and Abrams, her attorneys, for an order of judgment entered in this suit by this court January 27, 1932, for errors apparent upon the face of the record.

And it appearing to the court that notice of the pendency of this motion was duly given to the defendant, and that said defendant appeared in open court by its counsel, and that this matter was continued without further notice to this day, and the court having examined the records, heard the arguments of counsel and being fully advised in the premises, finds that the jury in said suit on to-wit: the 8th day of January,

A. D. 1932, returned its verdict into open court in this cause in the following words and figures, to-wit:

"We, the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of four thousand four dollars and 47/100 ($4,004.47) plus accrued interest."

That upon the return of said verdict into court the defendant entered herein its motion for a new trial, which said motion for a new trial was heard and denied by the court on to-wit: January 27, 1932, and thereupon said defendant's motion in arrest of judgment was also denied by the court on said date;

Whereupon it was considered by the court that the plaintiff have and recover of the defendant her damages in the sum of $4,004.47 principal, and accrued interest thereon from November 2, 1929, in the manner and form as by said verdict assessed, and the said clerk of said court was then and thereby the presiding judge thereof directed to enter an order of judgment in said suit in manner and form as aforesaid, but that through an inadvertence said clerk entered an order of judgment only in the sum of $4,004.47, the principal amount found to be due by said jury, and not for said principal amount plus accrued and computed interest thereon as directed by the court.

It is therefore ordered that the said order of judgment aforesaid be and same is hereby vacated and set aside, and plaintiff now in open court remitting the sum of $110 from the interest computed on said verdict in the amount of $436 as aforesaid, it is now considered by the court that the plaintiff have and recover of and from the defendant her damages in the sum of $4,004.47 principal plus interest in the sum of 58

$326, or a total of four thousand three hundred thirty and 47/100 ($4,330.47) dollars, and that she have execution therefor, and that the clerk of this court enter judgment in said suit in manner and form as last aforesaid.

To which order of judgment the defendant enters herein its exception, which is overruled, and the defendant now prays an appeal to the Appellate Court of Illinois for the First District, which appeal is allowed upon said defendant entering into bond in the sum of $5,000 with surety to be approved by the court in 60 days from this date and that said defendant have leave to present and file its bill of exceptions herein within 90 days from this date.

Enter: Thomas J. Lynch,
Judge.

Dated at Chicago, this 30th day of January, A. D. 1932.

59 Bill of exceptions and stipulation filed April 6, 1932.

61 Evidence. Trial commenced January 8, 1932, before Judge Thomas J. Lynch. Appearances, Messrs. Schulman, Schulman & Abrams for plaintiff, Elbridge W. Rice for defendant.

62 PLAINTIFF'S EVIDENCE.

LEO AWOTIN, a witness called on behalf of plaintiff, testified as follows:

Direct Examination by Mr. Abrams.

My name is Leo Awotin. I am and have been a physician and surgeon for fifteen years. My office is at 5914 South Francisco. I know the plaintiff, Rose Kimen. I have been at the Atlas Exchange National
63 Bank. I know the president, the cashier, and vice-president. I was present at the Atlas Bank about November 2, 1929. The cashier, Blankenheim, and Rose Kimen were there at that time.

64 We had a conversation on November 1 and November 2. The conversation on November 1 was at the Atlas Exchange National Bank. Rose Kimen and I and cashier Blankenheim were there.

65 Mr. Blankenheim said: "You know, instead of putting the money in a savings account she could buy bonds of the First National Company." He said those bonds will be short time bonds, you know, for a few months; and they are one hundred per cent good; they are out of town bonds. Rose Kimen said, you know, she needed the money, you know; that she couldn't buy bonds; and besides she don't know anything about those bonds, the out of town bonds, that she has not been able to investigate, she is not able to investigate those bonds. Mr. Blankenheim said, "Would you buy those bonds from us if we promise and agree to

repurchase those bonds at maturity, at par and accrued interest?" Now, she says: Well, that is what
66 suited her, you know; and she asked, you know, on what terms the banks sells those bonds. He said, you know, "Well, if you pay us, you know, $98 per hundred, then we agree and promise to repurchase those bonds from you at par value and accrued interest, and then we do not need to go and investigate those bonds. Those bonds will be due and you will get cash from the bank." Well, she said, that will be all right, "but I want you to write me down on a paper this contract what you propose me. Then Mr. Blankenheim said: "Well, then you have to pay one-half per cent more." She said, "I better pay you a half per cent to protect myself." Then she paid 98½ per hundred. That was on November 1.

67 I was at the bank on November 2. There was Mr. Blankenheim, myself and Rose Kimen, there. The document marked for identification Plaintiff's Exhibit 1, was signed in my presence.

68 The cashier, Mr. Blankenheim, at the Atlas Exchange National Bank signed it.

69 The document was delivered to Mrs. Kimen in my presence.

(Document offered and admitted in evidence as Plaintiff's Exhibit 1.)

It is in words and figures as follows:

70 Daniel M. Healy, President.

Daniel J. Healy, Vice-Pres.	P. Malakates, Vice-Pres.
J. H. Jones, Vice Pres.	B. M. Blankenheim, Cashier
M. F. Schiavone, Vice Pres.	E. T. Nordholm, Cashier

ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO

Capital and Surplus $240,000.00
Chicago, Ill.

Nov. 2, 1929.

Rose Kimen,
Chicago, Ill.

Dear Madam:

This is to acknowledge that we have this day sold you Four Thousand ($4,000.00) Dollars, par value First National Company, Collateral Trust, First Mortgage, Series "O" Real Estate 5½% Gold Bonds in denomination of $1,000.00 each, numbered 4595-4596-4599 and 4600.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $4,000.00 and accrued interest.

Yours very truly,

B. M. BLANKENHEIM,
Cashier.

B.M.B/CD

Member
Federal Reserve System.

Chicago Clearing
House Association.

71 The bonds marked for identification Plaintiff's Exhibits 2, 3, 4 and 5 were delivered to her when she bought those in the bank on November 2, 1929. They were delivered to her in my presence.

(Documents offered and admitted in evidence as Plaintiff's Exhibits 2 to 5, both inclusive.)

73 The said documents are four collateral trust First Mortgage 5½% Gold Bonds, Series "O" of the First National Company, due July 15, 1930, for $1,000.00 each and numbered, respectively, M4595, M4596, M4599 and M4600, each having attached thereto interest coupon No. 3 due July 15, 1930 for $27.50.

80 After these bonds were delivered to Miss Kimen I was at the Atlas Exchange National Bank with Miss Kimen several times. I was present with Rose Kimen at the West Side National Bank, not the Atlas Exchange Bank, but at the West Side National Bank.

81 That is a bank that consolidated with the Atlas Exchange National Bank. I was there July 15, 1930. Mr. Blankenheim, the cashier, was there. Miss Kimen was with me. She said, "Here are the bonds, you know, and I want you to repurchase those bonds." Mr. Blankenheim said, "I can't repurchase those bonds. You will have to see Mr. Healy first about those bonds. Mr. Healy has something to say to you." We afterwards saw Mr. Healy, Mr. Daniel M. Healy.

82 It was about a week after July 15 that we went to see Mr. Healy. We had a conversation with him at that time.

83 Miss Kimen said, "Well, I brought in those bonds to you, you know, to repurchase. Mr. Blankenheim told me to see you about those bonds." Mr. Healy said, "Well, I have no money at the present time to

repurchase them. The bank is merged. As soon as I get the money I will repurchase those bonds from you." He said, "I authorized the cashier to sell you those bonds and make with you a written contract and I am liable for those bonds, but at the present time there is no money on hand." He said to me that the Atlas Exchange National Bank merged with the West
84 Side National Bank. He said that the bank assets are tied up. He said he had about $160,000 in bank assets but the money was tied up and that she has to wait, you know, for a few months.

86 I was there several times with Rose Kimen at the bank. I don't remember exactly the date of the last time, but Mr. Blankenheim told me, you know, that the banks were merged and that the bank's assets are tied up, and the only thing for her to do is to wait.

Cross Examination by Mr. Rice.

I was not present with Rose Kimen before these bonds were purchased by her at the bank. November 1 was the first time I was there.

87 At that time I bought bonds and she bought bonds. She bought $2,000 worth on November 1 and $2,000 worth on November 2. She made two purchases. Mr. Blankenheim, the cashier, talked to me first, you know, about the bonds. Then afterwards he talked to her about bonds. He discussed first the matter with me in her presence, and then he discussed it with her, you know.

88 It isn't true that I first bought the bonds and then she said she wanted bonds on the same terms that I bought them. What did happen was that Mr. Blankenheim, the cashier, proposed to me those bonds. Now,

then, after when he was through with me—with his conversation he turned to Rose Kimen and proposed to her those bonds. He proposed those terms what I mentioned to you. And the conversation with her was an entirely separate one from the one with me. First he proposed the bonds to me.

89 I went to the West Side National Bank on July 15, the date that the bonds became due. I had not been there before the purchase of the bonds. I was there on July 15, 1930, the first time to propose those bonds for sale. After I talked to Mr. Blankenheim on July 15th I saw Mr. Healy about a week after. I saw him in his office right across the street in the Conway Building.

90 Rose Kimen was with me. The three of us were there. It is not true that at that time Mr. Healy told me that Mr. Blankenheim had no right to make the agreement with me. I testified in my own case here. That case was tried before Judge Rush in this court on May 31, 1931.

91 I testified at that trial.

Q. Didn't you at that time testify that Mr. Blankenheim said to you, "If you buy the bonds the price is 98, but if you buy under a written contract the price is 98½?"

Mr. Abrams: Objected to. Whatever this witness testified to at a different trial—

Mr. Rice: I am not through. Wait. I am not through with my question.

Mr. Abrams: All right.

Q. (Continuing.) One-half per cent in excess of the market price in consideration of the written agreement?

Mr. Abrams: Objected to. Whatever this witness testified to in that trial has nothing to do with this case.

The Court: Objection sustained.

Mr. Rice: Exception.

To which action of the court the defendant by its counsel then and there duly excepted.

92 Rose Kimen, a witness called on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Abrams.

My name is Rose Kimen. My occupation is a housekeeper, for Dr. Leo Awotin, the witness who testified a minute ago. I know Mr. Blankenheim, the cashier of the Atlas Exchange National Bank. I was at the Atlas Exchange National Bank about November 1, 1929.

93 Dr. Leo Awotin was with me. At that time I had a conversation with Mr. Blankenheim. Mr. Blankenheim said he had bonds for sale, First National Company Bonds, and they are 100 per cent good, safe and short term bonds. I told him I don't want to buy the bonds, that I don't know anything about the bonds, how good or how bad they are; and I need the money, and I could not buy the bonds.

Mr. Blankenheim said, "Would you buy the bonds from us if we repurchased them from you at maturity?" I asked what terms he is selling those bonds on. Mr. Blankenheim said, "If you buy those bonds from us now and pay 98 per one hundred down we promise and agree to repurchase those bonds from you at maturity at par value."

And I said, "I want a contract," and I asked Mr. Blankenheim, "would you please write it down?"

94 Mr. Blankenheim said, "If you want us to write down that in a contract you have to pay a half cent more for making the contract." I said, "I will pay the half cent more for you to make the contract"; and I pay 98½ per hundred.

95 And I accepted the contract. Mr. Blankenheim said it would be a half a cent more, and I said, "All right, I will pay the half cent," and altogether I paid $4,004.47.

Mr. Blankenheim said, "Now, you will have nothing to worry about on those bonds. As soon as those bonds are due you get your cash." If he wouldn't promise to give me the cash and wouldn't make the written contract I wouldn't buy the bonds, because I didn't know nothing about those bonds, that is all.

96 Plaintiff's Exhibits 2, 3, 4 and 5 are the bonds that I received at that time. They are exactly the bonds I received from him at that time. I was at the Atlas Exchange National Bank of Chicago, on July 15, 1930, that was at the West Side National Bank. Dr. Leo Awotin was with me. We saw Mr. Blankenheim, the cashier, and had a talk with him..

Mr. Rice: I object to any testimony as to the conversation with Mr. Blankenheim on July 15, 1930. 97

The Court: At the present time the objection is overruled.

Mr. Rice: Exception.

I offered him the bonds for sale at that time and he said, "I can't buy your bonds because you will have to see Mr. Healy, the president of the bank. He has something to say about those bonds." 98

A week or so later I went to see Mr. Healy with Dr. Awotin at 111 West Washington street. I offered him the bonds for sale, and he said that he hasn't any money to purchase those bonds; that as soon as he got the money that he would purchase those bonds, that the banks were merged and that he has no money to buy the bonds but as soon as he gets the money then he will buy the bonds back because he feels—

99 Afterwards I saw officers of the bank, but I didn't talk that matter over with them. I saw them some time but I didn't talk with them. I never received any money on those bonds. Since I first purchased the bonds I have collected the first coupon. I think that was on January 15, 1930.

100 I didn't collect the coupon on July 15, 1930. I am willing to tender these bonds to defendant if they will pay me back the money that I paid.

Mr. Abrams: On behalf of the plaintiff I now tender these bonds in open court if they will pay us back the four thousand and odd dollars we paid for them.

101 Plaintiff rests.

The following instructions and motions were offered by the defendant at the close of plaintiff's evidence:

102 Motion by defendant in writing to give the jury the following instruction:

"The jury are instructed to find the issues for the defendant."

Motion denied.

Exception by defendant.

104 Instruction marked refused.

Exception by defendant.

DANIEL M. HEALY, a witness called on behalf of defendant, testified as follows:

Direct Examination by Mr. Rice.

My name is Daniel M. Healy. I live at 3300 Sheridan road. I was president of the Atlas Exchange National Bank of Chicago.

The document which you show me marked Defendant's Exhibit 1 for identification is the charter under which the Atlas Exchange National Bank was organized.

107 The document marked for identification Defendant's Exhibit 2 is additional authorization given to the bank extending the period of its existence. Under the first the period of existence was twenty years. The law was changed to 99 years.

108 Defendant's Exhibit 1 offered and admitted in evidence.

Charter of the Atlas Exchange National Bank dated August 5, 1915, executed by Acting Comptroller of the Currency certifies that the bank is authorized to commence the business of banking as provided in Section 5169 of the Revised Statutes of the United States.

109 Defendant's Exhibit 2 offered and admitted in evidence, dated September 6, 1922, executed by D. R. Crissinger, comptroller of the currency, states that an Act to amend Section 5136 Revised Statutes of the United States, provides that all national banking

associations organized under the laws should have succession until 99 years from July 1, 1922, and certifies that the Atlas Exchange National Bank of Chicago was organized under the laws of the United States on July 1, 1922, and that its corporate existence was extended for 99 years from that date and subject to the conditions and the Act of Congress.

110 (Witness Daniel M. Healy, continuing): Mr. Blankenheim was not employed by the Atlas Exchange National Bank and was not an officer of the bank on July 15, 1930. The bank was out of business. It went out of business on June 21, 1930. Mr. Blankenheim was not at that time (July 15, 1930) connected in any way with the Atlas Exchange National Bank.

111 About a week after July 15, 1930, Rose Kimen and Dr. Awotin were at my office. At that time I did not state to them that I as president of the bank, or otherwise, had authorized the execution of the repurchase agreement which has been offered in evidence as Plaintiff's Exhibit 1. I did not state at that time that I was liable or that the bank was liable upon that contract and that I would pay.

112 At that time the doctor and Mrs. Kimen came in to the office and the doctor said that he had some First National bonds and so did Mrs. Kimen, that they had a repurchase agreement from the Atlas Exchange National Bank, that they had been down to see Mr. Blanhenheim and that he sent them to me. I said I had seen him about it because Mr. Blankenheim had called me up the week previously and said that they had been at the bank. I told them that I could not recognize that agreement because it was against the law.

I said, "Mr. Blankenheim never had any business signing it"; that if I paid the money I would be violating the law and I might become personally liable.

I told the doctor and Mrs. Kimen further that if I had the cash myself I would buy the bonds, but that my money was all tied up in bonds; that if they wanted to make a trade with me for some other bonds I would personally give them my own bonds for these; but that 113 I would absolutely not recognize it on behalf of the bank because I would only get myself into a fix by violating the banking law.

That was substantially the conversation. Dr. Awotin said he thought he would take bonds in exchange for them. He told me to send him a list so he could go out and look at the properties. I told him I would and about two days afterwards I made out a list. Then he sent me word that he did not want to go through with the deal on the exchange and I dropped it.

Q. Mr. Healy, do you know what the market value of these bonds was on the date of November 2, 1929?

Mr. Abrams: That is objected to.

The Court: What is your objection?

Mr. Abrams: What difference does it make what their market value was?

The Court: Objection sustained.

Mr. Rice: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

114 *Cross Examination by Mr. Abrams.*

I was and still am the President of the Atlas Exchange National Bank. The Atlas Exchange National Bank was not closed by the State Auditor. It is not still open, On July 15, 1930, the Atlas Exchange National Bank was not doing business. The Atlas Exchange National Bank was sold to the West Side National Bank.

115 When the bank was closed the West Side National Bank took over all the deposit liabilities. There were no trusts. There was a written agreement for the taking over of the bank. It is not a fact that the Atlas Exchange National Bank merged with the West Side National Bank, nor did they consolidate. We turned over the assets on their assumption of the deposit liabilities.

116 I never was President of the West Side National Bank, nor Vice-President. I never held an office or directorship, and never had anything to do with the West Side National Bank.

Mr. Litsinger, my partner, was the attorney for the bank. Mr. Blankenheim was cashier of the Atlas Exchange National Bank until the time it was taken over by the West Side National Bank, up to June 21, 1930. When it was taken over Mr. Blankenheim was made Assistant Cashier of the West Side National Bank.

If people had any dealings with the Atlas Exchange National Bank today and had to see the cashier I don't know who they would see. They did not have any cashier there.

117 When the bank went over to the West Side I had the resignations of all the officers.

I did not give the resignations to the Auditor of Public Accounts. He had nothing to do with that. This is a national bank.

I did not give them to the Comptroller. I am the liquidator of the bank. I have the resignations in my vault.

If anyone wanted to see Mr. Blankenheim they could find him at the West Side National Bank, but they could not find the cashier of the Atlas Exchange National Bank.

118 If anyone wanted to see the cashier of the Atlas Exchange National Bank in July, 1930, you mean? We had no cashier.

The Comptroller did not close the bank. We sold the bank out. The bank was never closed as you would close a bank. I sold it at 100 cents on the dollar.

There were minutes of the meeting where the resignation of Blankenheim, the cashier, was accepted. They should have been spread on the records.

119 I have not looked at the records lately, but my impression is that we did draw up minutes. I have the minutes in my office. I last saw them about a year ago.

My resignation as President is not there. I am the liquidator handling the whole thing and my resignation was not handed in.

121 I will not produce the minutes of the West Side National Bank and the Atlas Exchange National Bank at the time of the taking over of the bank unless I am ordered to. I have nothing to do with the West Side National.

In the course of being President of the Atlas Exchange National Bank I did not know that the bank had sold bonds with an agreement to repurchase same.

122 I never knew this until after Mr. Awotin went to Mr. Blankenheim and demanded payment, after the bank had been sold. I had no active management of the bank.

I used to go over about once a month.

Mr. Blankenheim was the active man in the bank.

There are not any claims against the bank for similar contracts. Mr. Awotin and this lady are the only two having such claims.

When I ascertained the existence of this agreement I did not offer to turn back any money. I did not offer as an officer of the bank to return any money.

123 I am not willing now to return the money. I have no right to return it.

When Mr. Awotin and Mrs. Kimen came to see me I knew that the bank was not liable on that agreement. I told them if they were not satisfied with the bonds I would take them back and give them some of mine. I thought that the bonds were good. I thought on July 15, 1930, the bonds were good. I have got money on mine since.

124 I knew on July 15th that the bonds were in default, but I still thought they were good.

Re-direct Examination by Mr. Rice.

I am willing to give her back the $20 that was received for the execution of this agreement.

126 Defendant rests.

127 **EVIDENCE IN REBUTTAL FOR PLAINTIFF.**

DANIEL M. HEALY, a witness called on behalf of plaintiff:

Direct Examination by Mr. Abrams.

129 Since testifying here I have received a subpoena to produce certain documents. I have neither of the documents mentioned in the subpoena, Documents Numbers 10692657 and 10692658.

131 I have the minutes of the Atlas Exchange National Bank.

I am looking at the document marked "Assignment" on page 203. It is the turning over of title to the bank of the other building.

132 I don't remember whether it was prepared by me or not.

133 It was prepared in my office.

I don't know whether a copy of it was filed in the office of the Recorder of Cook County because we turned it over to the bank.

134 I signed the original of that document. I don't know where the original is. The copy in this book is a true and correct copy of the original.

I have not had the original since the day the other bank took it. We sold it; and they took it.

This book that I hold is a true and correct minute book of the Atlas Exchange National Bank.

135 And everything contained therein is true and correct.

Mr. Abrams: I offer that page in evidence as Plaintiff's Exhibit 6.

Mr. Rice: If the court please, this resolution merely purports to authorize certain officers to make a conveyance of certain real estate from the Atlas Exchange National Bank to the West Side National Bank. It is not in any way material to the issues in this case.

The Court: It says they merged. I think I will permit it to be received in evidence.

Mr. Rice: Exception.

136 Said document offered and received in evidence as Plaintiff's Exhibit 6.

137

ASSIGNMENT.

WHEREAS, by proper vote of the Board of Directors and stockholders of the undersigned, The Atlas Exchange National Bank of Chicago, the said bank is being merged with The West Side National Bank of Chicago, and is conveying all of its assets to said The West Side National Bank of Chicago, and

WHEREAS, the undersigned is entitled to and is collecting rents from a certain portion of the premises located at 915-917-919 and 925 S. Halsted Street, also 772 W. Taylor Street, Chicago, and

WHEREAS, it is desired to assign to said The West Side National Bank of Chicago, all of the right, title and interest of the undersigned in and to said rentals,

NOW THEREFORE, IN CONSIDERATION OF THE FOREGOING and in consideration of the sum of ten (10) dollars paid to the undersigned by The West Side National Bank of Chicago, receipt whereof is hereby acknowledged, the undersigned, The Atlas Exchange National Bank of Chicago, does hereby sell, assign, transfer and set over unto said The West Side National Bank of Chicago, all of its right, title and interest in all of the rentals being collected by the undersigned from the premises known and described as follows:

> Lots One (1), Two (2), three (3), and four (4) in the County Clerk's Division of Lots one (1), Six (6), seven (7), twelve (12), thirteen (13), eighteen (18), nineteen (19) and twenty-four (24), in Block Ten (10) in the School Section Addition to Chicago, in Cook County, Illinois.

The undersigned also authorizes and empowers the said The West Side National Bank of Chicago to collect said rentals in its own name or in its name as assignee, of the undersigned, and authorizes said assignee to take any steps necessary including legal procedure to enforce payment of said rentals and to collect the same pursuant to the terms of this agreement.

In witness whereof, the undersigned, The Atlas Exchange National Bank of Chicago, has caused this assignment to be executed in its name by its President thereunto duly authorized and its corporate seal to be affixed, duly attested by its cashier, this .... day of June, 1930.

The Atlas Exchange National Bank of Chicago.

By ....

President

Attest:

By ....

Secretary.

138 (Witness, Daniel M. Healy, continuing.)

Page 201 of this book is a true and correct record so far as it goes, but it is only part of the whole record.

That is one page of the contract. The whole contract is in there. It is all true and correct. The contract starts right there, on this page (indicating).

139 The first page is 193. The whole transaction is from page 193 to page 201, and is a true and correct copy of the minutes of the entire transaction.

Mr. Abrams: I offer that in evidence as Defendant's Exhibit 7.

Mr. Rice: I object to this for the same reason, that there is nothing here that is material. There is no provision here in this resolution or in the contract authorizing the West Side National Bank to act for the Atlas Exchange National Bank with reference to transactions similar to this. They did not assume those obligations. They did not under this become the successor in any way to the Atlas Exchange National Bank, under any of the provisions here.

144 The Court: I will overrule the objection.

Mr. Rice: Exception.

Which said document was offered and received in evidence as Plaintiff's Exhibit 7.

146 MINUTES of Special Meeting of the Board of Directors of the Atlas Exchange National Bank of Chicago, Chicago, Illinois, held on the 20th day of June, A. D. 1930, in their banking quarters at 925 So. Halsted Street, Chicago, Illinois.

Present:

Daniel M. Healy
T. Frank Quilty
Daniel J. Healy
Peter Malakates
Andrew J. Schultz
Salvatore Ferrara
Salvatore Sisco
B. M. Blankenheim

The Minutes of the previous meeting held on the 19th day of May, 1930, were read and approved.

The President announced that because so many of the customers of the Atlas Exchange National Bank has moved westward, he had opened up negotiations for a merger with the West Side National Bank, at Ashland Avenue and Roosevelt Road, and that a contract has been prepared providing the terms and conditions thereof, which proposed contract is as follows:

THIS AGREEMENT entered into by and between THE WEST SIDE NATIONAL BANK OF CHICAGO, a corporation organized and existing under and by virtue of the laws of the United States, party of the first part, and THE ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation duly organized and existing under and by virtue of the laws of the United States, party of the second part, WITNESSETH:

Whereas, the West Side National Bank has offered to assume and agree to pay the deposit liabilities of the Atlas Exchange National Bank as of June 20, 1930. All charged off assets of the Atlas Exchange National Bank are also to be transferred.

Now therefore, the parties hereto in consideration of the assumption of such liabilities and of One Dollar each to the other in hand paid, the receipt whereof is hereby acknowledged, agree as follows:

Party of the second part agrees to hold the party of the first part free and harmless from loss on account of the assumption of such liabilities, and in pursuance of such agreement will transfer, assign, and convey to the party of the first part all of its assets, consisting of cash, bonds, securities, notes, choses in action, and real estate, and charged off assets are also included. It is the intention to transfer all assets of any character whatsoever whether shown by the books or not as of June 20, 1920.

Party of the second part agrees to execute its corporate promissory note for Two Hundred Thousand ($200,000.00) Dollars, payable on or before one from date with interest at six (6%) per cent per annum, which note and interest shall be secured by such part of said bonds, securities, notes, choses in action, property and real estate as is described in Schedule "A" hereto attached. It is understood, however, that all assets of any character whatsoever of the party of the second part assigned and conveyed to the party of the first part shall be utilized to the full extent and value to guarantee the party of the first part from any loss of any character due to the assumption of the liabilities aforesaid.

Party of the first part shall at all times have the full right and power of substitution of any assets mentioned in "Schedule A" for any other asset not therein mentioned. For instance if any of the assets not described in "Schedule A" are considered unsatisfactory at any time said party of the first part shall have
147 the right to substitute therefor, assets of like amount which are described in "Schedule A," and party of the first part shall have such power of substitution before any proceeds or credits are applied on said note for Two Hundred Thousand ($200,000.00) Dollars.

Party of the first part shall have the power to compromise or convert into cash any notes that are acquired from party of the second part and a renewal or compromise shall not in any way affect the rights of the party of the first part. At any time that the party of the first part so desires, it may elect to select any asset or assets and give proper credit therefor to the party of the second part.

Any legal or other expenses necessary to liquidate any assets from the Atlas Exchange National Bank shall be charged to the Atlas Exchange National Bank and interest on deposits will be computed and charged against the Atlas Exchange National Bank as of June 20th, 1930.

Party of the second part agrees forthwith to furnish to party of the first part, a bond or guarantee, with surety satisfactory to party of the first part, in form and content of "Schedule B" hereto attached. One year from the date hereof an appraisal will be made of the assets of party of the second part by a person or persons to be selected by the parties hereto, and if they do not agree, then to be selected by the Chief National Bank Examiner of the Seventh Federal Reserve District, and at the election of party of the first part it will demand and obtain the payment of the Two Hundred Thousand ($200,000.00) Dollars provided to be paid by said bond or guarantee, or so much of it as said party of the first part shall deem necessary. In case the assets as appraised plus the Two Hundred Thousand ($200,000.00) Dollars proceeds of said bond or guarantee shall be deemed insufficient by party of the first part to make it entirely safe on its assumption of said liabilities, it shall have the right to require an examination of the assets by a National Bank Examiner in order to enforce the individual liability of the stockholders of party of the second part, as provided by the National Bank Act, and nothing in this agreement shall be construed as a waiver of that liability. Such assessment, however, shall not be made in less than eighteen (18) months from the date hereof, and if made, party of the second part shall have the right to purchase all or any part of said assets at the appraised value.

In the event that the surety or sureties, guarantor or guarantors on said bond pay said Two Hundred Thousand ($200,000.00) Dollars, or any part thereof, and any assets are turned back to the shareholders of party of the second part for final liquidation, they shall have the right to participate in the liquidation of these assets to the amount that they have paid on the surety bond before payment shall be made to the individual shareholders of the party of the second part. It is the intent of this agreement that the shareholders of the party of the second part shall have no rights in the assets until the party of the first part has been fully protected from and indemnified against all claims of any character whatsoever on the liabilities assumed.

It is expressly understood between the parties hereto that the party of the first part does not assume the liabilities of the party of the second part except those as shown by the daily statement of the bank.

The Atlas Exchange National Bank agrees to do every act necessary to carry out the intent of this agreement and also to place the Atlas Exchange National Bank in voluntary liquidation at a later date in order to dispose of its charter.

In witness whereof the said parties of the first and second part have caused these presents to be signed by their respective presidents and attested by their respective cashiers, or secretaries and their respective seals to be hereto affixed this 20th day of June, A. D. 1930.

West Side National Bank of Chicago
By Thomas J. Healy,
President.

148 Attest:
A. B. Waltershausen,
Secretary.

Atlas Exchange National Bank of Chicago
By Daniel M. Healy,
President.

Attest:
B. M. Blankenheim,
Cashier.

149 Plaintiff rests.

153 The following instructions and motions were offered at the close of all the evidence.

154 Motion made by plaintiff in writing to give the jury the following instruction in writing:

155 The court instructs the jury to sign and return into court in the above entitled cause, a verdict in the following words and figures:

> 'We the jury, find the issues for the plaintiff and assess the plaintiff's damages in the sum of $4,319.47.'

Motion denied.

Instruction marked "refused".

158 Motion by defendant in writing to give the jury the following instruction in writing:

159 The jury are instructed to find the issues for the defendant.

160 Motion denied.

Exception by defendant.

Instruction marked "refused".

Exception by defendant.

162 The court thereupon at the request of the plaintiff gave to the jury on behalf of the plaintiff the following instructions, to the giving of each and all of which instructions the defendant duly excepted:

1.

163 The jury are instructed that you the jury are the sole judges of all the questions of fact in this case, and you should determine these questions from the evidence in this case. The law of the case, as contained in the instructions given by the court to the jury should

be applied by the jury to the facts of the case as you find such facts to be from the evidence. The jury should not be influenced in the slighest degree as to the facts in the case, by any assertion or statement of counsel, on either side of the case, unless the same is sustained by the evidence in the case.

2.

164 The court instructs you that if you find from the evidence that any witness or witnesses has or have wilfully and knowingly testified falsely as to any matters or things material to the issues in this case then you are at liberty to disregard the whole of the testimony of such witness or witnesses except insofar as the testimony of such witness or witnesses have been corroborated by other credible evidence or by facts and circumstances proven on the trial.

3.

165 You are instructed that the credibility of the several witnesses testifying in this case is exclusively a question for the jury to determine, as is also the weight to be attached to the testimony of each of them. In determining the credibility of the several witnesses as to any disputed issue in this case, you have a right to take into consideration, the opportunity of the different witnesses for knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements in view of all the evidence, facts and circumstances proven on the trial, and from all the evidence, facts and circumstances in

evidence, determine on which side is the weight or preponderance of the evidence.

4.

166 The jury are instructed that if you believe from the evidence that the plaintiff, Rose Kimen, purchased from Atlas Exchange National Bank of Chicago, a corporation, securities aggregating $4,000 known and described as gold bonds maturing July 15, 1930, and that she purchased said securities relying upon the promise and agreement of the defendant that it would repurchase said securities at maturity at par plus accrued interest thereon, and that plaintiff paid for said securities the sum of $4,004.47, and did thereafter on July 15, 1930, offer or tender back said securities to the bank demanding the payment thereof, that the defendant should be liable to the plaintiff for the amount paid by her plus accrued interest thereon upon the tender of the securities purchased by her, and if you believe from the evidence that plaintiff tendered such bonds to the defendant and that the defendant refused to accept such tender and pay back the consideration therefor, that in such event the defendant would be liable to the plaintiff for the full amount paid by her plus accrued interest thereon from the date of such agreement.

167 The plaintiff also asked the court to give to the jury the following instructions:

5.

168 The jury are instructed that if it finds from the preponderance of the evidence in this case, under the instructions of the court, that the plaintiff, Rose

Kimen, purchased from the defendant, the Atlas Exchange National Bank of Chicago, the certain securities referred to in plaintiff's declaration on file in this case and generally described as certain "gold bonds" which by their terms matured July 15, 1930, and aggregating in amount $4,000, and that before the plaintiff purchased said securities from said defendant and as a condition precedent to the purchase thereof, the plaintiff and defendant entered into an agreement which amongst other things provided in substance that if the plaintiff would purchase said "gold bonds" from the defendant at the time she did purchase them, at the consideration of their par or face value, plus accrued interest, that it, the defendant, would, if requested by the plaintiff, repurchase said securities from her at their maturity at their par or face value, plus the then accrued interest thereon, and further find that plaintiff relying upon said agreement purchased said securities and then and there paid to the defendant for said securities and as part of said agreement the sum of $4,004.47 and further find that thereafter on or about to-wit: July 15, 1930, the maturity date of said "gold bonds," plaintiff tendered said "gold bonds" to the defendant pursuant to said agreement aforesaid, if you find said agreement was entered into, and requested the defendant to repurchase said bonds then you are instructed
169 that notwithstanding the defense interposed by the defendant on this trial that the making of the agreement claimed by the plaintiff to have been made at the time she purchased said securities, with said defendant, for the repurchase thereof, was an *ultra vires* act, meaning an agreement that it was prohibited by law from entering into, that

this constitutes no defense to an agreement such as the plaintiff alleges was made at the time she purchased the bonds, because the defendant could not take the plaintiff's money under an *ultra vires* or invalid act on its part and keep it, if the act by which it received the money was *ultra vires* or invalid on its part, then it must return the money received under such an invalid act. Therefore, if you find from the preponderance of the evidence, that it did receive the money from the plaintiff under an agreement in manner and form as above stated, it will be your duty to find the issues for the plaintiff and assess her damages at the amount of money it received from the plaintiff, namely $4,004.47 plus interest at the rate of 5 per cent per annum from the date it was received allowing credit to the defendant for such interest as the plaintiff collected on said securities, namely, $.., or a verdict in the sum of $......................................

170 But the court refused such instruction and marked the same "refused." Thereupon the court, at the request of the defendant, gave to the jury on behalf of the defendant, the following instructions:

1.

171 If the jury believe from the evidence in this case that the bonds involved were sold to the plaintiff by the defendant at a price of 98 per cent of their par value, and if you further believe from the evidence that there was paid by the plaintiff to the defendant an additional one-half of one per cent of the par

value of said bonds as the consideration for the execution by the bank of the repurchase agreement offered in evidence, then you are instructed that the plaintiff is only entitled to recover in this case the said one-half of one per cent of the par value of said bonds or twenty dollars, with interest thereon at five per cent from November 2, 1929, and that there can be no other or further recovery by the plaintiff.

2.

172 The court instructs the jury that prior to and on the 2nd day of November, 1929, there was a certain act of Congress in full force and effect which provided among other things that banks organized under the national banking laws of the United States of America should in the business of buying and selling investment securities be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, co-partnership, association or corporation in the form of bonds, notes, or debentures commonly known as investment securities.

3.

173 It is your duty to try this case and consider the defendant in all matters pertaining to this case as though it were a living person instead of a case in which the defendant is a corporation, and the fact that the plaintiff is an individual and the defendant is a corporation should make no difference with you, nor should any sentiment of prejudice or feeling of sympathy have any weight with you in deciding this case. It is your duty to try this case and consider the evidence with the same fairness and impartiality and

arrive at the same verdict as you would if the contest were between two men.

4.

174 You are further instructed that while the law permits a plaintiff in a case to testify in her own behalf, nevertheless, you have a right, in weighing her evidence and determining how much credence is to be given it, to take into consideration the fact that she is the plaintiff and that she is interested in the result of the suit.

5.

175 The jury are instructed that the plaintiff is required by law to establish her case by a preponderance of the evidence before she can recover. If the plaintiff in this suit has not so established her case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then, in either of these cases the jury should find the issues for the defendant.

176 The court instructs the jury that in determining which side has the greater weight of evidence, you are to take into consideration that each side is entitled to the benefit of the testimony of each and every witness, without regard to which side may have called the witness, and you are required by the law to allow the defendant the benefit of any and all admissions by witnesses called for the plaintiff, which you may believe, under the evidence and instructions of the court, have weight or bearing in defendant's favor.

177 And the defendant, by its counsel, also asked the court to give to the jury the following instruction:

178 The court instructs the jury that the defendant Atlas Exchange National Bank had no power or authority to enter into the contract offered in evidence by the plaintiff dated November 2, 1929, wherein the said bank agreed to repurchase at par the First National Company collateral Series "O" First Mortgage Real Estate 5½% Gold Bonds involved in this suit, but that said contract is invalid and void and there can be no recovery thereon.

But the court refused to give such instruction to the jury, to which action of the court the defendant then and there duly excepted.

179 The verdict of the jury favored the plaintiff, finding the defendant guilty, and assessing the plaintiff's damages at the sum of $4,004.47, plus accrued interest.

Motion by defendant for a new trial overruled. Exception by defendant. Motion by defendant in arrest of judgment overruled. Exception by defendant.

180 Thereupon the court on the 27th day of January, A. D. 1932, entered judgment upon the verdict, to the entry of which judgment the defendant then and there duly excepted.

The defendant prays an appeal to the Appellate Court of Illinois, First District, which is allowed upon the filing of bond for $5;000 in sixty days and bill of exceptions in ninety days.

Whereupon on the 30th day of January, A. D. 1932, plaintiff moves court to vacate judgment entered January 27, 1932, the court thereupon vacated and set aside the said judgment. Whereupon plaintiff remitted the sum of $110 from the amount of said verdict, and the court thereupon on the 30th day of January, 1932, entered judgment for the plaintiff in the sum of $4,330.47, to which action of the court the defendant by its counsel then and there duly excepted.

Defendant prays an appeal to the Appellate Court of Illinois, First District, which was allowed upon filing of bond in the sum of $5,000 in sixty days and bill of exceptions in ninety days.

181 Certificate to bill of exceptions signed by Thomas J. Lynch, Judge of the Circuit Court, dated the 6th day of April, A. D. 1932, marked "presented the 6th day of April, A. D. 1932. I approve the above bill of exceptions.

SHULMAN, SHULMAN & ABRAMS,
Attorney for Plaintiff."

182 Stipulation to incorporate in transcript of record original bill of exceptions.

184 Order approving bill of exceptions.

185 Writ of error from Appellant Court of Illinois to the Circuit Court of Cook County filed December 30, 1933.

187 Certificate of clerk to transcript of record.

188

ASSIGNMENT OF ERRORS.

And now comes the Atlas Exchange National Bank of Chicago, the plaintiff in error, by Elbridge W. Rice, its attorney, and says that in the record and proceedings and in rendering the judgment aforesaid there is manifest error, in this, to-wit:

1st. The trial court erred in admitting improper evidence on behalf of the plaintiff.

2nd. The trial court erred in refusing to admit proper evidence on behalf of the defendant.

3rd. The trial court erred in giving improper instructions on behalf of the plaintiff.

4th. The trial court erred in refusing proper instructions on behalf of the defendant.

5th. The trial court erred in overruling defendants motion for a new trial.

6th. The trial court erred in overruling the defendant's motion in arrest of judgment.

7th. The trial court erred in overruling the defendant's motion to direct a verdict for the defendant at the close of plaintiff's case; and in refusing to instruct the jury to find the issues for the defendant.

8th. The trial court erred in overruling the defendant's motion to direct a verdict for the defendant at the close of all the evidence in the case; and in refusing to instruct the jury to find the issues for the defendant.

9th. The verdict is against the evidence.

10th. The verdict is against the weight of the evidence.

11th. The verdict is in contravention of the law.

12th. The verdict is against the law and the evidence.

13th. The judgment is not legally supported by the evidence.

By reason whereof the plaintiff in error prays that said judgment may be reversed.

Elbridge W. Rice,

Attorney for Atlas Exchange National Bank of Chicago, a corporation, Plaintiff in Error.

47 At A Term Of The Appellate Court, Begun and held at Chicago, on Tuesday, the Fifth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-four within and for the First District of the State of Illinois.

Present:

Hon. John J. Sullivan, Presiding Justice.
Hon. Martin M. Gridley, Justice.
Hon. Wickham Scanlan, Justice.
Sheldon W. Govier, Clerk.
William D. Meyering, Sheriff.

Rose Kimen,
Defendant in error,
37308 *vs.*
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in error.
Appeal from Error to Cook Circuit.

Be It Remembered, That heretofore on the 5th day of December A. D. 1933, it being one of the days of said December Term, A. D. 1933, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

48 At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Fifth day of December in the year of our Lord One Thousand Nine Hundred and Thirty-three within and for the First District of the State of Illinois.

Present:

Hon. David F. Matchett, Presiding Justice.
Hon. William H. McSurely, Justice.
Hon. John M. O'Connor, Justice.
Sheldon W. Govier, Clerk.
William D. Meyering, Sheriff.

Court met pursuant to law. Court opened by proclamation.

And afterwards, on the 28th day of December A. D. 1933, there was filed in the office of the Clerk of said Court the Peoples Praecipe for a Writ of Error and Writ of Scire Facias which said Praecipe is in words and figures following, to-wit:

49 PRAECIPE.

State of Illinois,
Appellate Court, } ss.
First District

To The February Term, A. D. 1934.

49 ROSE KIMEN,
(*Plaintiff*,)
Defendant in Error,
Gen. No. 37308
vs.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
(*Defendant*.)
Plaintiff in Error.

Error to the Circuit Court of Cook County.
Nisi Prius Gen. No. B-204984
Nisi Prius Judge Thomas J. Lynch

The Clerk will please issue a writ of Error in the above entilted cause, directed to the Clerk of the Circuit Court of Cook County. Also issue a Writ of Scire Facias to the Sheriff of Cook County, commanding him to summon the said Defendant in Error, as provided by law.

This was an action of trespass on the case upon promises in the Circuit Court of Cook County, Illinois, wherein judgment was rendered on the 30th day of January A. D. 1932 and at the January 1932 Term of said Circuit Court, on the law side thereof in favor of Rose Kimen and against Atlas Exchange National Bank of Chicago, a Corporation for Four Thousand Three Hundred Thirty & 47/100 ($4330.47) Dollars besides costs of suit.

Elbridge W. Rice,
Attorney for Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in Error.

To Sheldon W. Govier,
Clerk of the Appellate Court,
First District, Illinois.

50 And afterwards on the same day to-wit: the 28th day of December A. D. 1933, there issued out of the office of the Clerk of said Court and under the seal of said Court the Peoples Writ of Error in said cause directed to the Clerk of the Circuit Court of Cook County, which said Writ of Error is in the words and figures following, to-wit:

51 State of Illinois,
Appellate Court, } ss.
First District.

THE PEOPLE OF THE STATE OF ILLINOIS.

To the Clerk of the Circuit Court for the County of Cook, Greeting:

Because, In the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County, before the Judge thereof, between Rose Kimen, plaintiff, and Atlas Exchange National Bank of Chicago, a Corporation, defendant, it is said manifest Error hath intervened, to the injury of the aforesaid Atlas Exchange National Bank of Chicago, a Corporation, defendant, as we are informed by its complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Appellate Court the Records and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Chicago, in the County of Cook, on or before twenty days before the first Tuesday of February next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the Error, what of right ought to be done according to law.

Witness, The Hon. David F. Matchett, Presiding Justice of our Court and the seal thereof, at Chicago, this 28th day of December in the year of our Lord one thousand nine hundred and Thirty-three.

(Seal) **Sheldon W. Govier,**
Clerk of the Appellate Court of the First District.

52 And afterwards on the same day to-wit: the 28th day of December A. D. 1933, there issued out of the office of the Clerk of said Court and under the seal of said Court the Peoples Scire Facias in said cause directed to the Sheriff of Cook County to execute which said Scire Facias with the return of the Sher-

iff thereon endorsed is in the words and figures following, to-wit:

53 State of Illinois,
Appellate Court, } ss.
First District

The People of the State of Illinois, to the Sheriff of Cook County, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County before the judge thereof, between Rose Kimen, plaintiff, and Atlas Exchange National Bank of Chicago, a Corporation, defendant, it is said manifest Error hath intervened, to the injury of the said Atlas Exchange National Bank of Chicago, a Corporation, defendant, as we are informed by its complaint, the record and proceedings of which said judgment we have ordered to be brought into our Appellate Court, of the First District, State of Illinois, at Chicago, before the Justices thereof, to correct the errors in the same in due form and manner, according to law.

Therefore, We Command You, That by good and lawful men of your county, you give notice to the said Rose Kimen that she be and appear before the Justices of our said Appellate Court, at the next term of said Court, to be holden at Chicago, in said State, on the first Tuesday in February, A. D. 1934, to hear the record and proceedings aforesaid, and the errors assigned if she shall see fit, and further to do and receive what said Court shall order in this behalf; and have you then and there the names of those by whom you shall give the said notice, together with this writ.

Witness, Hon. David F. Matchett, Presiding Justice of our Court and the seal thereof, at Chicago, this 28th day of December in the year of our Lord one thousand nine hundred and Thirty-three.

(SEAL) SHELDON W. GOVIER,
Clerk of the Appellate Court of the First District, Illinois.

State of Illinois } ss.
Cook County }

Served this writ on the within named defendant Rose Kimen by reading the same to her and at the same time delivering a copy thereof to her this 6th day of January, 1934.

WILLIAM D. MEYERING, *Sheriff.*
By EDWARD J. MORAN, *Deputy.*

54 And afterwards on the 19th day of January A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

55 In the Matter of the Assignment of Cases to the Third Division Appellate Court, First District, Illinois. } February Term, A. D. 1934. Calendar

On the Court's own motion it is ordered that the following numbered cases on the February Term Calendar, A. D. 1934 of said Court be and the same are hereby assigned to the Third Division Appellate Court for hearing and determination, to-wit:

37308: *Rose Kimen v. Atlas Exchange National Bank of Chicago.*

And afterwards, on the 16th day of February, A. D. 1934, it being one of the days of the February Term, A. D. 1934 the Appearance of the Defendant in Error was filed in the words and figures following, to-wit:

56 APPEARANCE

State of Illinois,
Appellate Court, } ss.
First District.

February Term, A. D. 1934.

Rose Kimen, *Defendant in error,* Gen. No. 37308 vs. Atlas Exchange National Bank.	Appeal From Error to Circuit Court of Cook County

I hereby enter the appearance of Rose Kimen and my appearance as attorney for said defendant in error in the above entitled cause.

Lloyd C. Whitman,
Attorney for defendant in error.

And afterwards on the same day to-wit: the 16th day of February, A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

57

Rose Kimen, *Defendant in error,* 37308 vs. Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in error.*	Error to Cook Circuit.

This day came Defendant in error by her counsel and moved the Court to extend the time to and including March 19th, A. D. 1934 in which to file her briefs in said cause as per suggestions, affidavit and consent filed herein. And the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards on the 23rd day of February A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

58 ROSE KIMEN,
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
Error to Cook Circuit.

At the request of the Judges of the Third Division, Appellate Court, it is ordered that the order heretofore entered herein in said cause on January 19th, A. D. 1934 assigning said cause to the Third Division, Appellate Court be and the same is hereby vacated and set aside, and said cause is hereby assigned to the Second Division, Appellate Court for hearing and determination.

And afterwards on the 6th day of March A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

59 ROSE KIMEN,
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
Appeal from
Error to Cook Circuit.

This cause having this day been reached in the call of the docket, and counsel not desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on abstracts and briefs filed by Plaintiff in error and brief of Defendant in error due March 19, 1934.

And afterwards, on the 7th day of March, A. D. 1934 the following proceedings were had and entered of record in said cause, to-wit:

LEO AWOTIN,
Defendant in Error.
37307 *vs.* Error to Cook Circuit.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

ROSE KIMEN,
Defendant in Error.
37308 *vs.* Error to Cook Circuit.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

This day came Defendant in error by his Counsel and moved the Court to consolidate cause General Number 37308 for hearing in this Court with cause General Number 37307 in this Court and that the briefs filed and to be filed in cause General Number 37307 stand and be taken and considered as the briefs filed in cause General Number 37308 as per suggestions, affidavit and consent filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 3rd day of April A. D. 1934, it being one of the days of the April Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

61

ROSE KIMEN,
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
Error to Cook Circuit.

This day came Plaintiff in error by its Counsel and moved the Court to advance the above entitled cause for an early decision in this Court as per petition filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 10th day of April A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

62

LEO AWOTIN,
Defendant in Error,
37307 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
Error to Cook Circuit.

ROSE KIMEN,
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Error to Cook Circuit.

This day came Defendants in error by their Counsel and moved the Court that the above entitled cause be placed on the Oral Argument Calendar of this Court as per suggestions filed herein. And the Court being fully advised in the premises doth grant said motion. It is therefore ordered by the Court that said causes be and the same are hereby placed upon the Oral Argument Calendar of this Court.

And afterwards on the 1st day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

63 Leo Awotin,
Defendant in Error.
37307 *vs.* Error to Cook Circuit.
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error

Rose Kimen,
Defendant in Error
37308 *vs.* Error to Cook Circuit.
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

On motion of Defendant in error this day made in open Court for leave to file a Supplemental Brief in said cause instanter and that Plaintiff in error be granted leave to file an additional Reply Brief within 10 days. It is ordered by the Court that said motion be and the same is hereby allowed.

And afterwards on the 15th day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

64 Leo Awotin,
Defendant in Error.
37307 *vs.* Error to Cook Circuit.
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

Rose Kimen,
Defendant in Error,
37308 *vs.* Error to Cook Circuit.
Atlas Exchange National Bank of Chicago a Corporation,
Plaintiff in Error.

This day came Defendants in error by their Counsel and moved the Court that the suggestions hereto attached stand and be taken as an additional brief of Defendants in error herein or that the Defendants in error be granted leave to file an additional brief in said cause within 3 days as per suggestions and affidavit filed herein. And the Court being fully advised in the premises doth order that the additional suggestions hereto attached stand and be taken as an additional brief of the Defendants in error herein.

And afterwards on the same day to-wit: the 15th day of May A. D 1934, the following proceedings were had and entered of record in said cause, to-wit:

65 Leo Awotin,
Defendant in Error
37307 *vs.* Error to Cook Circuit.
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

Rose Kimen,
Defendant in Error.
37308 *vs.* Error to Cook Circuit.
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

This day came Plaintiff in error by its counsel and moved the Court for leave to file the additional suggestions hereto attached as an answer to the suggestions of the Defendant in error as per suggestions filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 15th day of June A. D. 1934, it being one of the days of the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

66	ROSE KIMEN, *Defendant in Error,*	
No. 37308	*vs.*	Error, to Cook Circuit. Appeal, from ....
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment of January 30th, A. D. 1932 aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and procedings aforesaid, Judgment of January 30th, A. D. 1932 of the Circuit Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed. And it is further considered by the Court that the said Plaintiff in error recover of and from the said Defendant in error its costs, by it in this behalf expended in this Court and in the Circuit Court of Cook County to be taxed, and that it have execution therefor.

67 And afterwards on the 26th day of June A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

68

LEO AWOTIN, *Defendant in Error.* 37307 *vs.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	Error to Cook Circuit.
ROSE KIMEN, *Defendant in Error,* 37308 *vs.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	Error to Cook Circuit.

The Court having considered the motion of Defendants in error for a Certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause as per petition and affidavit filed herein, and being now fully advised in the premises doth order that said motion be and the same is hereby denied.

And afterwards on the 3rd day of July A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

69 LEO AWOTIN,
Defendant in Error,
37307 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
Error to Cook Circuit.

ROSE KIMEN,
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
Error to Cook Circuit.

The Court having considered the motion of Defendants in error that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for leave to Appeal shall have expired, or if such petition shall have been filed within the proper time, then until said petition shall have been granted or refused, and the Court being fully advised in the premises, doth grant said motion, and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the same day to-wit: the 3rd day July A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

70 LEO AWOTIN,
Defendant in Error,
37307 *vs.* Error to Cook Circuit.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

ROSE KIMEN,
Defendant in Error,
37308 *vs.* Error to Cook Circuit.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

The Court having considered the motion of Defendants in error that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for a Writ of Certiorari to review the judgment of this Court in said cause shall have expired, without any such petition having been filed, and if such petition for said Writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused, and the Court being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the 16th day of August A. D. 1934, it being one of the days in vacation after the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

ROSE KIMEN,
Defendant in Error,
37308 *vs.* Error to Cook Circuit.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

On this day in vacation after the June Term A. D. 1934 came Defendant in error by her Counsel and moved the Honorable John J. Sullivan, one of the Justices of said Court, to substitute Samuel A. and Leonard B. Ettelson as Attorneys for Defendant in error herein in said cause, in lieu of Lloyd C. Whitman as per withdrawal and substitution filed herein. And the undersigned being fully advised in the premises doth order that said motion be and the same is hereby allowed.

JOHN J. SULLIVAN,
Justice of the Second Division, Appellate Court, First District, Illinois.

And afterwards on the same day to-wit the 16th day of August A. D. 1934, it being one of the days in vacation after the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

ROSE KIMEN
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

Error to Circuit Court

On this day in vacation after the June Term A. D. 1934 came Rose Kimen, Defendant in error in said cause and Plaintiff in the Circuit Court of Cook County, and moved the Honorable John J. Sullivan, one of the Justices of said Court, for the issuance of the Certificate of this Court that there is fairly involved in the claim of the said Rose Kimen, Defendant in error aforesaid more than Fifteen Hundred Dollars ($1500.00) as per affidavit filed herein. And the undersigned being fully advised in the premises is of the opinion and Therefore Certify that more than Fifteen Hundred Dollars ($1500.00) is fairly involved in the claim of the said Rose Kimen, Defendant in error herein and Plaintiff in the Circuit Court of Cook County.

JOHN J. SULLIVAN,
Justice of the Second Division, Appellate Court, First District, Illinois.

And heretofore, on the 15th day of June A. D. 1934, it being one of the days of the June Term A. D. 1934, there was filed in the office of the Clerk of said Appellate Court the written opinion of this Court, which opinion is in the words and figures following, to-wit:

73 ROSE KIMEN
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

Error to
Cook County.
Cook Circuit.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out on December 28, 1933, to the February term, 1934, of this court. On March 7, 1934, on motion of defendant in error, the case was ordered to be consolidated for hearing with case No. 37307, *Awotin* v. *Atlas Exchange National Bank,* and subsequently the two cases were advanced for hearing and were heard on oral argument and printed briefs submitted. An opinion has this day been filed in the *Awotin* case.

The Atlas Exchange National Bank, defendant in the trial court, here seeks to reverse a judgment against it for $4,330.47, entered by the circuit court of Cook county in plaintiff's favor on January 30, 1932, following the verdict of a jury. The action, which is in *assumpsit,* was commenced on August 19, 1930. Plaintiff's declaration, filed September 5, 1930, consisted of the common counts and a special count. In the special count plaintiff alleged in substance:

> "That on November 2, 1929, at Chicago, the Atlas Bank offered to sell to plaintiff "$4,000,

First National Company, Collateral Trust, Series 'O' First Mortgage Real Estate 5½% Gold Bonds," in denomination of $1,000 each, and then and there "promised that if plaintiff purchased said bonds and paid therefor the sum of $4,000, together with the accrued interest thereon, it (defendant) would repurchase from plaintiff the said bonds at maturity, paying therefor par value of
74 the bonds and accrued interest thereon;" that plaintiff, in consideration thereof, on November 2, 1929, paid to defendant the sum of $4,000 and purchased from it the bonds; that to evidence the agreement defendant reduced it to writing; and that "as an inducement to plaintiff to purchase said bonds," defendant then and there delivered to plaintiff the following writing:

"November 2, 1929.

Rose Kimen,
Chicago, Ill.

Dear Madam:

This is to acknowledge that we have this day sold you $4,000, par value, First National Company Collateral Trust, First Mortgage, Series 'O' Real Estate 5½% Gold Bonds, in denomination of $1,000 each, numbered 4595-4596-4599 and 4600.

Should you desire to recall these bonds to us, we hereby agree to repurchase same at maturity at par, or $4,000, and accrued interest.

Yours very truly,
(Signed) B. M. Blankenheim,
Cashier."

That the bonds matured on July 15, 1930; that on that day plaintiff presented them to defendant and demanded that it repurchase them and pay to plaintiff the sum of $4,000 and the accrued interest; that defendant refused to repurchase the

> bonds and, although plaintiff has made repeated demands subsequent to July 15, 1930, upon it to repurchase them "in accordance with said agreement," yet defendant has not paid said sum of $4,000 and accrued interest, or any part thereof, to plaintiff, and refuses so to do; to plaintiff's damage, etc.

Accompanying the declaration, and on the reverse side of the printed form of the common counts, is "plaintiff's affidavit of amount due," sworn to by Thomas C. Kennedy on September 4, 1930, in substance that plaintiff's demand is for the sum of $4,250, "due and owing from defendant to plaintiff under its *written agreement dated November 2, 1929;*" and that there is now due to plaintiff from defendant, after allowing to it all just credits, etc., the sum of $4,250.

To the declaration defendant filed a plea of the general issue, accompanied with an affidavit of merits by its president, and with a written demand for a jury trial. On October 15, 1931, defendant, by leave of court, filed an additional plea, accompanied with an amended affidavit of merits by its president. In the plea it is alleged:

> 75 That defendant is a national bank, organized under the National Banking Laws of the United States; that "neither its charter nor the said law gives to defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation, or to repurchase bonds at maturity, but requires that defendant in buying and selling investment securities shall do so *without recourse;*" and that the "supposed guaranty or repurchase agreement of the said B. M. Blankenheim, Cashier, as set forth in plaintiff's declaration, is *ultra vires* and *void.*"

In the amended affidavit of merits, filed with the additional plea, it is stated:

> That there is not owing to plaintiff from defendant the sum of $4,250, or any other sum; that the supposed agreement set forth in the declaration "is not the agreement of defendant;" that defendant never authorized or empowered anyone to execute the same; that defendant is a corporation organized under the Banking Laws of the United States; that under the provisions of said laws defendant "had no power or authority to enter into said supposed agreement mentioned in plaintiff's declaration;" and that "such agreement is *ultra vires* and *void.*"

To the additional plea plaintiff filed a replication in which she alleged:

> "'That if defendant by its laws was prohibited from buying and selling the securities set forth and described in plaintiff's declaration and was not authorized by the National banking laws of the United States to enter into the agreement with plaintiff to receive her money, then it ought to return the moneys thus wrongfully received by it from plaintiff, together with interest thereon at the legal rate,—plaintiff hereby offering and tendering to return the securities purchased on the alleged illegal agreement."

On October 26, 1931, by leave of court, plaintiff filed an additional count in which, after mentioning the execution and delivery by defendant of the repurchase agreement of November 2, 1929, etc., it is alleged that she then and there paid to defendant for said bonds the sum of $4,004.47, and received the bonds from it; that when they matured, viz., July 15, 1930, she presented them to defendant and "demanded that it repurchase said bonds, but that defendant refused and

still refuses so to do;" that defendant "now claims that said agreement was prohibited by the National Banking Act and that it had no right to execute the same;" that by reason thereof "plaintiff tenders said bonds in open court and demands the return of the consideration paid, plus accrued interest thereon from
76 the date of said sale;" and that it is defendant's duty to repay the same to her, but that after repeated demands defendant still refuses so to do; to plaintiff's damage, etc. Accompanying the additional count is plaintiff's affidavit in which she states "that the nature of her claim is for moneys had and received by defendant from plaintiff, as is more fully set out in said additional count;" and that there is due to her from defendant, after allowing all its just deductions, etc., the sum of $4,004.47, plus interest, etc. To the additional count defendant filed a general demurrer, but on November 5, 1931, the court overruled it.

On November 14, 1931, to the additional count, defendant filed a plea of the general issue and two other pleas. In the second plea it alleged that neither its charter nor the National Banking Law give to it any power or authority in selling investment securities to enter into an agreement to repurchase the same at a subsequent date, but require that such securities be sold "without recourse," and that the supposed repurchase agreement mentioned is "*ultra vires* and void." In the third plea there are similar allegations and the additional allegation that "the only benefit" received by defendant for the execution of said agreement "was the payment to it of one-half per cent of the face value of the bonds mentioned in said agreement; or twenty ($20) dollars." Accompanying the pleas is an affidavit of merits, stating *inter alia* that under the provisions of the banking laws of the United States defendant "had no power or authority to enter into the agreement mentioned in plaintiff's declaration; that such agreement is *ultra vires* and void; and that the only benefit received by defendant on account of said contract was the sum of twenty ($20) dollars, paid as the consideration for the execution of the same."

In plaintiff's replication to the third plea she alleged
77 that "if defendant was by said National Banking Laws prohibited from entering into the agreement with plaintiff to receive her money, then it ought to return the money thus wrongfully received by it; that the benefits received by defendant from plaintiff were not the sum of $20, as alleged in said third plea to the additional count, but that it received the entire amount from plaintiff as set forth in said additional count; and that defendant ought, therefore, to return the entire consideration received by it; and plaintiff hereby offers and tenders to return the securities purchased on the allegel illegal agreement."

On the trial plaintiff testified in her own behalf and she called as a witness for her Dr. Leo Awotin, a physician and surgeon practicing in Chicago. She also introduced in evidence, in addition to certain other writings, the repurchase agreement and the four bonds referred to in the declaration. For defendant Daniel N. Healy, its president, testified, and he gave further testimony when called by plaintiff in rebuttal. Certain other writings were offered by defendant and received in evidence. At the conclusion of plaintiff's evidence in chief, and again at the close of all the evidence, defendant moved for a directed verdict in its favor, but the motions severally were denied. While plaintiff was on the stand, her attorney, in her behalf, and with her consent, formally tendered the four bonds to defendant "if defendant will pay back the four thousand and odd dollars paid to it for them." A part of plaintiff's testimony is in substance as follows:

> My occupation is that of housekeeper for Dr. Awotin. I was at the offices of defendant bank in Chicago on November 1st and 2nd, 1929, and Dr. Awotin was with me. We had conversations with Mr. Blankenheim, cashier of the bank. He said that the bank had bonds for sale, First National Company bonds, and that they "are 100 per cent good, safe and short term bonds," I told him "I don't want to buy those bonds as I don't know anything about them, how good or how bad they are." Blankenheim then asked: "Would you buy the bonds from us if we agreed to repurchase them from you at maturity (July 15, 1930)?" And I "asked what were the terms?" He replied "If you buy these bonds from us now and pay 98 per one hundred down, we will promise and agree to repurchase them from you at par value." Then I said: "I want a contract; will you please write it down?" Whereupon Blankenheim said: "If you want us to write that in a contract, you will have to pay a half cent more for making the contract." I replied: "I will pay the half cent more for you to make the contract." And "I paid 98½ per hundred; and I accepted the contract; and I paid altogether for the bonds $4,004.47." After I had received the four bonds, Blankenheim said: "Now you will have nothing to worry about on these bonds; as soon as they are due you will get your cash." The four bonds now shown me are the same bonds I received at that time. Thereafter *I collected on the coupons* which became due on January 15, 1930. I didn't collect on the coupons which matured on July 15, 1930. I never

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> received any other money on the bonds. When the bonds matured, July 15, 1930, I, in company with Dr. Awotin, again saw Blankenheim at the bank. I offered him the four bonds, but he said: "I can't buy your bonds because you will have to see Mr. Healy, president of the bank." A week or so later, Dr. Awotin and I saw Mr. Healy at his office at 111 West Washington Street, Chicago; I offered the bonds to him; but he said that the bank "hadn't any money to purchase these bonds." And that "as soon as he got the money he would purchase them," and that the bank had become "merged" with another bank.

Dr. Awotin in his testimony corroborated plaintiff as to the purport of the conversations had with Blankenheim on November 1st and 2nd, 1929, and as to the execution and delivery to her by the bank of the repurchase agreement and the delivery of the four bonds to her. He further testified in part:

> "After these bonds were delivered to Miss Kimen I was at the Atlas Bank with her several times. * * On July 15, 1930, I was present with her at the West Side National Bank. That is the bank that consolidated with the Atlas Bank. We there saw Blankenheim. Miss Kimen said: 'Here are the bonds and I want you to repurchase them.' He said: 'I can't repurchase them; you will have to see Mr. Healy first about the bonds; he has something to say to you.' About a week afterwards we saw Healy and had a conversation with him. Miss Kimen said: 'I have brought these bonds to you to repurchase; Blankenheim told me to see you about them.' Healy said: 'I have no money at the present time to repurchase them; the bank is merged; as soon as I get the money I will repurchase the bonds from you; * * I authorized the cashier to sell you these bonds and make with you a written contract; I am liable for

> the bonds, but now there is no money on hand.' Healy said to me that the Atlas Bank merged with the West Side National Bank; that the bank's assets are tied up * * and that she would have to wait for a few months."

Defendant's witness, Healy, its president, testified in part substantially as follows:

> That Blankenheim was not an officer of the Atlas Bank (defendant), or an employee of it or in any way connected with it, on July 15, 1933; that the Atlas Bank went out of business on June 21, 1930,
> 79 and was closed and is still closed; that its assets were turned over to the West Side National Bank upon the latter's assumption of its deposit liabilities; that it is not a fact that the Atlas Bank "merged" with the West Side Bank, nor did they "consolidate," that he (the witness) never held any office in the West Side Bank, or had anything to to with its business affairs; that up to June 21, 1930, Blankenheim was the cashier of the Atlas Bank and the active man in its affairs; that on that day he severed his official connection with it, and when its assets were turned over to the West Side Bank he was made an assistant cashier of the latter bank; that when the Atlas Bank was closed he (the witness) procured the resignations of all of its officers, and he has been and is now acting as the liquidator of the bank; that the "Comptroller did not close the bank;" that before the bank ceased doing business he (the witness) had no active management in the affairs of the bank; that he never knew until shortly after July 15, 1930, when Dr. Awotin and Miss Kimen saw Blankenheim and demanded payment of the amounts of certain bonds which they had purchased of the bank, that the bank had sold bonds with an agreement to repur-

> chase them; and that Dr. Awotin and Miss Kimen are the only two having claims against the bank based upon such repurchase agreements.
>
> That about a week after July 15, 1930, Dr. Awotin and Miss Kimen had a conversation with him at his office; that at that time he did not state that, as president of defendant bank or otherwise, he had authorized the execution of the repurchase agreement sued upon, or that he or the bank were liable upon the agreement to pay back the amount of the bonds; that on the contrary he stated to them that he "could not recognize the agreement because it was against the law;" that "Blankenheim never had any business signing it," that if he paid the money demanded he "would be violating the law and might become personally liable" and that if they wanted to make a trade with him for other bonds he would *personally* give them some of his own other bonds for the bonds in question; that subsequently negotiations were had between him (the witness) and Dr. Awotin concerning proposed trades of bonds, but finally Dr. Awotin sent word to him that he did not want to make any of the proposed trades; that at the time of the said conversation of July 15, 1930, he believed "that the bank was not liable on that agreement;" that he then personally owned some of the bonds of the same issues; that although those bonds were then in default he "still thought they were good;" and that he has since received money on those that he owns."

In view of the pleadings, the repurchase agreement sued upon and the evidence, including the testimony of plaintiff, we are of the opinion that the trial court erred in not granting defendant's motions to instruct the jury to return a verdict in its favor and in enter-

ing the judgment in question. The respective contentions of opposing counsel, here made, are substantially the same as some of the contentions made in the *Awotin* case, No. 37307, in which it appears that an action was brought upon a similar agreement and in which
80 case an opinion has this day been filed. For the reasons stated in that opinion, and particularly because of the decisions and holdings in the recently adjudicated cases of *Knass* v. *Madison and Kedzie State Bank,* 354 Ill. 554, and *Texas & Pacific Railway Co.* v. *Pottorff,* 54 U. S. Sup. Ct. Rep., No. 7, pp. 416-20 (discussed in our opinion in the *Awotin* case) it seems clear to us that the agreement herein sued upon is beyond the powers of defendant bank to make and is void upon the ground of public policy, and that, therefore, it cannot be enforced by any court and the present judgment should be reversed without a remandment of the cause. Accordingly, the judgment of the circuit court of Cook County, entered against defendant on January 30, 1932, is reversed.

REVERSED.

SULLIVAN, P. J., AND SCANLAN, J., CONCUR.

81 And afterwards on the 31st day of October, A. D. 1934, it being one of the days of the October Term A. D. 1934, there was filed in the office of the Clerk of said Appellate Court, a certified copy of an order of the Supreme Court of Illinois, denying the petition for Leave to Appeal in said cause, which same order is in the words and figures following, to-wit:

UNITED STATES OF AMERICA

State of Illinois. ss.

At A Supreme Court, Begun and held in Springfield, on Tuesday the Second day of October, in the year of our Lord One Thousand Nine Hundred and Thirty-four, within and for the State of Illinois.

Present:
Hon. Norman L. Jones, Chief Justice.
Hon. Clyde E. Stone, Justice.
Hon. Frederic R. DeYoung, Justice.
Hon. Warren H. Orr, Justice.
Hon. Lott R. Herrick, Justice.
Hon. Paul Farthing, Justice.
Hon. Elwyn R. Shaw, Justice.
Otto Kerner, Attorney General.
Warren C. Murray, Marshal.
Attest: Adam F. Bloch, Clerk.

Be It Remembered, that to-wit: on the 23rd day of October A. D. 1934, the same being one of the days of the said October term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following to-wit:

ROSE KIMEN,
Petitioner,
22775 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO,
Respondent.

October 23, A. D. 1934.
Petition for leave to Appeal from First District.
B.204984 - 37308

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois and Keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Supreme Court in Springfield, in said State, this 30th day of October in the year of Our Lord one Thousand nine hundred and Thirty-four.

(Seal) Adam F. Bloch,
Clerk of the Supreme Court.

83 I, Sheldon H. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and Keeper of the records, files and seal thereof, Do Hereby Certify, that the foregoing pages numbered 1 to 46 inclusive are a true copy of the Abstract of Record filed by the Plaintiff in error in the case of *Rose Kimen, Defendant in error* v. *Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in error* in said Appellate Court on January 17th, A. D. 1934.

I further certify that the foregoing pages 47 to 81 inclusive are a true, full and complete Transcript of the Record of proceedings of said Appellate Court in the case of *Rose Kimen, Defendant in error* v. *Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in error,* of record in my office, and also of the opinion of said Appellate Court rendered herein and filed in said cause on the 15th day of June A. D. 1934, and also a certified copy of the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal in said cause which was filed in said Appellate on the 31st day of October A. D. 1934, in said cause, as all of the same now appear on file in my office.

In Testimony Whereof, I have set my hand and affixed the seal of said Appellate Court, this 15th day of December, in the year of our Lord One Thousand Nine Hundred and Thirty-four.

(Seal) Sheldon W. Govier,
Clerk of the Appellate Court,
First District, Illinois.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1935

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, First District, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

15

FILE
JAN 22
CHARLES ELMORE

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1934.

No. 662

ROSE KIMEN,
Petitioner,
vs.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

Samuel A. Ettelson,
Edward C. Higgins,
Attorneys for Petitioner.

CHICAGO LAW PRINTING CO., 107 N. WACKER DRIVE TEL. FRANKLIN 6321

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1934.

No.

ROSE KIMEN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court of The United States:

Now comes Rose Kimen and respectfully petitions this Honorable Court to grant a writ of *certiorari* to the Appellate Court of Illinois, First District, and to remove therefrom to this Court for review the record in the case lately pending in the said Appellate Court entitled, *Rose Kimen* v. *Atlas Exchange National Bank of Chicago, a corporation*, being case No, 37308, on the docket of the said Appellate Court of Illinois. The Supreme Court of Illinois denied your petitioner's Petition for Leave to Appeal on October 23, 1934.

A duly certified record is filed herewith under separate cover and includes all of the proceedings in the Circuit Court of Cook County where said cause was tried, in the Appellate Court of Illinois, First District, in which Court the respondent herein, the said Atlas Exchange National Bank of Chicago, prosecuted a writ of error to review the judgment of the trial court, and in the Supreme Court of Illinois, in which your petitioner filed her said Petition for Leave to Appeal from the judgment of said Appellate Court of Illinois.

I.

Statement of facts.

Your petitioner respectfully represents that in the trial court she was the plaintiff and the respondent was the defendant.

The uncontradicted facts shown by the evidence are: That the respondent, by its cashier, solicited your petitioner to purchase four One Thousand Dollar ($1,000) par value First National Company real estate bonds; that the price at which such bonds were first offered for sale was Ninety-eight Dollars ($98.00) per hundred and accrued interest; that your petitioner refused to purchase them, stating to said cashier that she needed her money, and that she knew nothing about the bonds; that said cashier then offered, on behalf of the respondent, to repurchase said bonds from your petitioner if she would buy them; that your petitioner agreed to make the purchase, provided said offer to repurchase was reduced to writing; that said cashier stated that if said agreement was reduced to writing, the bonds would cost Ninety-eight and one half Dollars ($98.50) per hundred, and accrued interest, which price your petitioner agreed to and did pay and which aggregated the sum of Four Thousand Four Dollars and Forty Seven Cents ($4,004.47); and that in return therefor, your petitioner received the four bonds and a written contract wherein the respondent agreed to repurchase the same at their maturity at par and accrued interest. At the maturity thereof, your petitioner called upon the said cashier, on behalf of said respondent, to repurchase said bonds, but that said respondent refused so to do.

II.

Statement of proceedings.

Your petitioner respectfully represents that it is necessary to state briefly the pleadings in this case in order to arrive at a clear understanding of the issues and the theory upon which a recovery is predicated.

The action is in assumpsit and, as originally filed, the declaration contained a count in special assumpsit for the breach of the written contract, and also the common counts in general assumpsit (Rec. p. 1).

To said declaration, the respondent filed two pleas: (1) The general issue (Rec. p. 5); and (2) a special plea alleging, in substance, that said agreement was *ultra vires* the respondent under the National Bank Act (Rec. p. 6).

Your petitioner subsequently filed an additional count to her declaration alleging the facts of the transaction, namely, the payment of Four Thousand Four Dollars and Forty Seven Cents ($4,004.47) to the respondent in consideration for the purchase of the bonds and the delivery of the written contract; the repudiation of the contract by the respondent on the ground that it was *ultra vires* under the National Bank Act; the demand by your petitioner for the return of said sum with interest thereon and the offer of your petitioner to return said bonds (Rec. p. 8).

To this additional count, the respondent filed three pleas which were in substance: (1) The general issue; (2) a special plea that the contract was *ultra vires,* as aforesaid; and (3) a special plea alleging, in substance that the only benefit received by the respondent under the alleged *ultra vires* contract was Twenty Dollars ($20.00), being the difference between Ninety-eight Dollars ($98.00) per hundred at which the bonds were originally offered to your petitioner and Ninety-eight and one half Dollars ($98.50) per hundred, the price at which the bonds were finally sold to your petitioner (Rec. pp. 9-10).

After a trial before a jury, the trial court entered a judgment in favor of your petitioner and against the respondent upon a verdict for your petitioner in the sum of Four Thousand Four Dollars and Forty Seven Cents ($4,004.47) and accrued interest (Rec. p. 13).

On December 28, 1933, the respondent sued out a writ of error in the Appellate Court of Illinois, First District, to review the said judgment of the Circuit Court of Cook County. Thereafter, on, to wit, June 15, 1934, the said Appellate Court of Illinois, First District, reversed the said judgment of said Circuit Court of Cook County and, without remanding said cause to the trial court, entered its own judgment against your petitioner (Rec. p. 63).

On June 26, 1934, the said Appellate Court of Illinois denied the motion of your petitioner for a certificate of importance and an appeal to the Supreme Court of Illinois (Rec. p. 64).

On October 23, 1934, the Supreme Court of Illinois denied to your petitioner leave to appeal to said Supreme

Court of Illinois from the judgment of the Appellate Court of Illinois, First District (Rec. p. 80) and by virtue of sub-section (2), Section 75, Article VIII of the Illinois Civil Practice Act (Cahill's Illinois Revised Statutes, 1933, chapter 110, paragraph 203), the said judgment of the Appellate Court of Illinois became final.

Since it is discretionary with the Supreme Court of Illinois to review the decision of the Appellate Court on Petition for Leave to Appeal, and since the Supreme Court of Illinois has denied your petitioner's said Petition for Leave to Appeal, a writ of *certiorari* from this Court should be addressed to the Appellate Court of Illinois, First District, commanding it to certify and to send to this Court the record of the proceedings in said cause. The limit of time for the making of such application in this Court runs from the date when the Petition for Leave to Appeal was denied by the Supreme Court of Illinois, the highest tribunal in the State of Illinois in which a decision in this cause can be had, on October 23, 1934.

> *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 20.

III.

Reasons for the allowance of the writ.

Your petitioner further respectfully represents that she is aggrieved by the final judgment of the Appellate Court of Illinois and the final order of the Supreme Court of Illinois, wherein said Supreme Court of Illinois denied your petitioner's Petition for Leave to Appeal from said judgment of the Appellate Court of Illinois; that the matters at issue are wholly of a Federal nature and are of peculiar gravity and importance in that said Appellate Court of Illinios has decided a Federal question of substance under said National Bank Act in a way probably not in accord with the applicable decisions of this Honorable Court.

A.

Specifications of error.

The errors on account of which the judgment of the Appellate Court of Illinois, First District, should be reversed are as follows, to wit:

1. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in finding and holding that your petitioner was not entitled to recover from the respondent on an implied assumpsit, the moneys paid by your petitioner to said respondent in reliance upon said void contract and agreement.

2. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in not finding and holding that your petitioner was entitled to recover from the respondent herein on an implied assumpsit, the moneys paid by your petitioner to said respondent in reliance upon said void contract and agreement.

B.

Summary of point relied upon for reversal of judgment.

I. The petitioner is entitled to recover from the respondent, in general assumpsit, the moneys which she paid to said respondent for the purchase of the First National Company bonds in reliance upon the respondent's agreement to repurchase said bonds, which agreement said respondent repudiated as being ultra vires under the National Bank Act. (44 Stat. 1226.)

IV.

Jurisdiction of this court.

Your petitioner respectfully represents to this Honorable Court that this case involves a Federal question, namely, the rights, privileges, immunities and the extent of liability, if any, of a national banking association organized and existing under the laws of the United States.

> *First National Bank, etc.* v. *Alexander Anderson,* 172 U. S. 573.
>
> *Leander J. McCormick* v. *Market National Bank of Chicago,* 165 U. S. 538.
>
> *Logan County National Bank* v. *Townsend,* 139 U. S. 67, pp. 72, 73.

It follows from the fact that this case involves a Federal question and from the further fact that the decision of the Appellate Court of Illinois, First District, is from the highest court of the State of Illinois in which a decision in this case can be obtained, that it is within the jurisdiction of this Court to entertain this petition and to issue its writ of *certiorari* as herein prayed.

> *Chicago & Eastern Illinois R. R. Co.* v. *Industrial Commission of Illinois,* 284 U. S. 296, 297.
>
> *Chesapeake & Ohio R. R. Co.* v. *Mihas,* 280 U. S. 102, 104.
>
> *Minneapolis, St. P. & S. S. Ry. Co.* v. *Rock,* 279 U. S. 410.
>
> *American Railway Express Co.* v. *Levee,* 263 U. S. 19.

V.

Prayer.

For the purpose of correcting the errors complained of and to the end that the rights of your petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of *certiorari* may be issued under the seal of this Court directed to the Appellate Court of Illinois, First District, commanding it to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and proceedings of said Appellate Court in the within case, to the end that the judgment of said Appellate Court of Illinois, First District, may be reviewed by this Court, as provided by law, and that the judgment of the Appellate Court of Illinois may be reversed by this Honorable Court, and that your petitioner may have such other relief as to this Court may seem appropriate.

Rose Kimen,
Petitioner.

Samuel A. Ettelson,

Edward C. Higgins,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No.

ROSE KIMEN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

I.

The petitioner is entitled to recover from the respondent, in general assumpsit, the moneys which she paid to said respondent for the purchase of the First National Company bonds in reliance upon the respondent's agreement to repurchase said bonds, which agreement said respondent repudiated as being ultra vires under the National Bank Act. (44 Stat. 1226.)

The opinion of the Appellate Court of Illinois rendered with the decision in this case, refers to the "*Awotin* case, No. 37307" decided by said Court on the same day as the case at bar, and states that the decision was controlled by what that Court had said in the Awotin case (Rec. p. 79). This Honorable Court will find the full opinion of the Appellate Court of Illinois rendered in said *Awotin* case set out in Appendix B. The case is reported in 275 Ill. App. 530, under the title, "*Awotin* v. *Atlas Exchange National Bank of Chicago.*"

A petition for a writ of *certiorari* to review the judgment of the Appellate Court in the *Awotin* case was filed simultaneously with the within petition.

In the case at bar, the respondent must be regarded as having been the owner of the First National Company bonds which it sold to the petitioner. Selling property is an act of ownership, unless the contrary is shown. *Farmers' & Merchants' State Bank* v. *Mellum, et al.*, 173 Minn. 327, 212 N. W. 308. There is no such showing in the record in this case. It follows, therefore, that when the petitioner purchased said bonds solely in reliance upon the agreement by this respondent to repurchase said bonds (uncontradicted testimony of the witnesses Awotin and Kimen, Rec. pp. 15-23), the respondent received the entire purchase money, the Four Thousand Four Dollars and Forty Seven Cents ($4,004.47), for its own use and benefit. The purchase money thus received became a part of the assets of the bank just as the bonds had been.

After having obtained the petitioner's money by means of this contract, the respondent, when called upon to perform its obligations, repudiated the agreement, claiming that it was void and not within its charter powers under the National Bank Act.

It is a well-settled rule of law often decided by this Court, that a corporation, which has repudiated a contract as being *ultra vires*, will not be permitted to retain the benefits which it has received under such a void agreement, but that it is liable therefor upon an implied assumpsit.

Central Transportation Co. v. *Pullman, etc., Co.,* 139 U. S. 24, 60.

Logan County National Bank v. *Townsend,* 139 U. S. 67.

Pullman Car Company v. *Central Transportation Co.,* 171 U. S. 138, 151.

Aldrich v. *Chemical National Bank,* 176 U. S. 618.

Citizens' Central National Bank v. *Appleton,* 216 U. S. 196.

Coon v. *Smith,* 4 Fed. Supp. 960.

This doctrine for which we contend is distinguishable from the general rule announced by this Court that a corporation may not be estopped to plead the defense of *ultra vires* and that no rights arise out of an *ultra vires* contract (*Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245). The petitioner's right of recovery in this case is predicated upon the theory that the respondent corporation, having received money under a void agreement, is not, in equity and good conscience, entitled to retain the money and at the same time repudiate the obligations of the contract.

The case of *Citizens' Central National Bank* v. *Appleton, supra,* 216 U. S. 196, is one wherein a National Bank to which one Samuels was indebted in the sum of Ten Thousand Dollars ($10,000), induced another bank to lend Twelve Thousand Dollars ($12,000) to Samuels and guaranteed the repayment of the loan. Samuels had prior thereto agreed to pay the National Bank Ten Thousand Dollars ($10,000) out of the Twelve Thousand Dollars ($12,000) loan. When sued on the guaranty, the National Bank defended on the ground that a guaranty was beyond its powers and in violation of the national banking laws. Of this defense, the Court said, on page 202:

> "But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank * * *. The law would be more impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. * * * In short, the Central National Bank, by means of the device mentioned, got Ten Thousand Dollars ($10,000) * * * for its own benefit, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief."

The Court then reviewed and discussed with approval the cases last cited by us in support of this point. For that reason, the *Appleton* case, *supra,* 216 U. S. 196, is important.

The case of *Coon* v. *Smith,* 4 Fed. Supp. 960, is directly in point upon the question of the right of the petitioner to recover, in general assumpsit, the moneys paid in reliance upon a repurchase agreement which the District Court in that case held to be *ultra vires.* We do not agree with the opinion of the learned Judge that a national bank has no authority to enter into a repurchase agreement, but his opinion contains a complete discussion of the authorities which support our contention.

The case of *Texas & Pacific Ry. Co.* v. *Pottorff, supra,* 291 U. S. 245, cited by the Appellate Court of Illinois in support of its proposition that the petitioner could not recover, in general assumpsit, the moneys paid in reliance upon the repurchase agreement, clearly does not sustain that proposition. There is nothing in the facts of the *Pottorff* case, or in what this Court said in its opinion, that is in conflict, either directly or indirectly, with the cases last cited by us.

In the *Pottorff* case, this Court said that a national bank could not be estopped from defending an action on a contract on the ground that it was *ultra vires,* and that *if the doctrine of the recovery of the benefits obtained by means of an ultra vires contract were applicable* (to the facts in the *Pottorff* case), the complainant therein would still not be entitled to recover the full amount of its deposit in the defunct bank because,

> "*The argument if applicable would not help the Railway.* Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable *res* and a constructive trust based on special circumstances of misconduct, confer a preference over other creditors. The pledge here challenged having failed because illegal, the Railway is entitled only to a dividend as a general creditor. Its right thereto is conceded." (Italics our own)

CONCLUSION.

We respectfully submit that we have shown that even if the repurchase agreement is *ultra vires* and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the Four Thousand Four Dollars and

Forty Seven Cents ($4,004.47) and accrued interest thereon which she paid to the respondent for the bonds, in reliance upon and for the claimed *ultra vires* and void agreement; that the Appellate Court of Illinois, First District, erred in reversing the judgment of the Circuit Court of Cook County; and that this Honorable Court should issue its writ of *certiorari* directed to the Appellate Court of Illinois, First District, to review and reverse said judgment of the Appellate Court of Illinois, First District.

Respectfully submitted,

Samuel A. Ettelson,

Edward C. Higgins,
Attorneys for Rose Kimen,
Petitioner.

APPENDIX A.

Illinois Civil Practice Act, sub-section (2) of Section 75, Article VIII:

> "In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court; *Provided, however,* that in action *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen hundred dollars ($1500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Ap-

pellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court: *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."

APPENDIX B.

Decision of the Appellate Court of Illinois, First District, in the case of *Awotin v. Atlas Exchange National Bank of Chicago*:

MR JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 28, 1933, the defendant, Atlas Exchange National Bank of Chicago, sued out the present writ of error to reverse a judgment order of the circuit court, entered April 15, 1932, in substance as follows:

> This cause coming on to be heard upon plaintiff's motion to strike defendant's affidavit of merits for *insufficiency* "upon the remand of the cause upon the reversal thereof by the appellate court for the first district in accordance with the opinion rendered by it," and "for a judgment as of default on the affidavit of claim," and it appearing that "the affidavit of merits does not state any defense to plaintiff's cause of action" and that the court is therefore entitled to strike said affidavit of merits, it is "Therefore Ordered that said affidavit of merits * * * is hereby stricken from the files in this cause."
>
> And it further appearing from plaintiff's affidavit of claim, dated September 4, 1930, that there was due to plaintiff at said date the sum of $37,085.41, and that plaintiff is entitled to interest at 5 per cent on said sum from the date of the affidavit of claim to this day, which has been computed to be the sum of $2,756.25; and that the total damages sustained by plaintiff, and herein assessed against defendant, amount to the sum of

> $39,841.66; and that plaintiff is entitled to recover said total sum from defendant.
>
> "WHEREUPON it is considered by the court that plaintiff have and recover of defendant his damages in the sum of $39,841.66;" and that the clerk of this court issue an execution in favor of plaintiff and against defendant "on the judgment herein now entered as aforesaid."

This is the second time the cause has been before us. From our former opinion (*Awotin* v. *Atlas Exchange National Bank*, 265 Ill. App. 238), it appears that plaintiff's action against defendant (commenced August 19, 1930) is in *assumpsit;* that during March, 1931, on the issues made by the pleadings, the cause came on for trial before a jury; that at the conclusion of plaintiff's evidence the court, on defendant's motion, directed the jury to return a verdict in *defendant's* favor, which they did; that on May 23, 1931, judgment was entered upon the verdict against plaintiff for costs and he appealed to this court; and that on February 23, 1932, for reasons stated in the opinion, we reversed the judgment and remanded the cause, generally and without specific directions. In the opinion we outlined the pleadings, including the accompanying affidavits, as follows (pp. 239-41):

> "Plaintiff's declaration consisted of a special count and the common counts. In the special count he alleged that on November 1, 1929, at Chicago, defendant offered to sell to him '$35,000 Dollars First National Company Collateral Trust, Series O, First Mortgage Real Estate 5½% Gold Bonds in denominations of $1,000 each, and then and there promised that, if plaintiff purchased the bonds and paid therefor the sum of $35,000, together with accrued interest thereon, it (defend-

ant) would repurchase the bonds at maturity, paying therefor the par value of the bonds and accrued interest;' that plaintiff, in consideration thereof, on November 1, 1929, paid to defendant said sum and purchased the bonds from it; that to evidence the agreement defendant reduced the same to writing and, as an inducement to plaintiff to purchase the bonds, then and there delivered to plaintiff the following writing:

Nov. 1, 1929.

'Mr. Leo Awotin,
1920 S. Halsted Street, Chicago.

Dear Sir:

This is to acknowledge that we have this day sold you $35,000 par value First National Company, Collateral Trust, Series O, First Mortgage Real Estate 5½% gold bonds, in denomination of $1,000 each, numbered as follows: #4584-4585 and 4612 to 4644, inclusive.

Should you desire to resell these bonds to us, we hereby agree to repurchase same at maturity at par, or $35,000 and accrued interest.

Yours very truly,
B. M. Blankenheim,
Cashier.'

That the bonds matured on July 15, 1930; that on that day plaintiff presented them to defendant and demanded that it repurchase them and pay to plaintiff the sum of $35,000 and accrued interest; that defendant refused so to do; and that although plaintiff has made repeated demands on defendant since July 15, 1930, to the same effect it has not repurchased the bonds or paid to him the $35,000 and accrued interest or any part thereof, but still refuses. To plaintiff's damage, etc.

> In plaintiff's affidavit of amount due, attached to the declaration, and dated September 4, 1930, it is stated that his demand 'is for the sum of $37,085.41, due and owing to plaintiff from defendant *under its written agreement, dated November 1, 1929,* and that there is due from defendant after allowing to it all just credits, deductions and set-offs $37,085.41.'
>
> Defendant entered its appearance by attorney, demanded a jury trial, and filed a plea of the general issue. In the accompanying affidavit of merits of Daniel M. Healy he alleged that he is the president of defendant, that there is not owing to plaintiff any sum of money, and that 'defendant did not enter into any agreement with plaintiff and never authorized or empowered anyone else to enter into the agreement alleged in the declaration or in the affidavit thereto attached.' On the eve of the trial defendant by leave of court, filed an additional plea alleging that it is a national bank, organized under the banking laws of the United States, that 'neither its charter nor the general law gives to defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation nor to repurchase bonds at maturity,' and that the supposed guarantee or repurchase agreement of said Blankenheim, cashier, as set forth in the declaration, 'is *ultra vires* and void.' To this additional plea plaintiff filed a replication."

It also appears from the present record that there accompanied said additional plea an affidavit of merits, signed and sworn to by said Healy, stating:

> "That there is not owing to plaintiff from defendant the sum of $37,085.41, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of defendant; that defendant never authorized or empow-

> ered anyone to execute the same; and that said supposed agreement is *ultra vires* and *void.*"

And the bill of exceptions discloses that on April 9, 1932, after the mandate of this court had been filed, an attorney for plaintiff appeared in the circuit court, after notice to defendant, and moved the court "to strike defendant's affidavit of merits from the files because of its *failure to state a meritorious defense,* and that judgment be entered against defendant, as in case of default, on the affidavit of claim attached to plaintiff's declaration;" and that on April 15, 1932, after arguments of respective counsel, the court granted the motion and entered the judgment now in question against defendant as first above mentioned.

In our former opinion, we quoted a portion of subsection 7 (as amended February 25, 1927) of Section 5136 of the U. S. Revised Statutes, relating to the powers, etc. of National Banks, as follows:

> "To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title: *Provided,* That the business of buying and selling *investment securities* shall hereafter *be limited* to buying and selling *without recourse* marketable obligations evidencing indebtedness of any person, co-partnership, association, or corporation, in the form of *bonds,* notes and/or debentures, commonly known as investment securities, under such further definition of the term 'investment securities' as may

> by regulation be prescribed by the Comptroller of the Currency, * * *."

We then stated the contentions of respective counsel as follows (p. 243):

> "Counsel for the bank contended in the trial court and contends here that under the above statute no recovery can be had by plaintiff in the present action, because the agreement of November 1, 1929, sued upon, is *ultra vires* the bank and wholly void. Counsel for plaintiff contend in substance that the court erred in entering the judgment (following the directed verdict) because:
>
> (1) The sale of the bonds by the bank to plaintiff, coupled with its written agreement to repurchase them at maturity at par and accrued interest amounts to a *conditional sale,* which is valid as such and the statute has no application; and
>
> (2) Even if it be considered that the bank in making the repurchase agreement acted *ultra vires,* plaintiff, having tendered the bonds, is entitled to recover back what he paid therefor plus accrued interest on an *implied* assumpsit,—the bank having retained the moneys it received in the transaction."

And we expressed the opinion (p. 244), after considering the written agreement of November 1, 1929, the arguments of respective counsel and numerous adjudicated cases, that the trial court had erred in instructing the jury as it did and in entering the judgment against plaintiff. We then discussed said two contentions of plaintiff's counsel and expressed the opinion that there was substantial merit in each. As to the first contention we cited and quoted from the cases of *Wolf* v. *National Bank of Illinois,* 178 Ill. 85, 93-5, and *Freedman* v. *Madison & Kedzie State Bank,* 259 Ill. App. 519, 523-4. As to the second contention we cited and quoted from several cases decided by the Supreme Court of the United States. And we also discussed, and decided adversely to it, defendant's further contention that there could be no recovery by plaintiff in the case upon an *implied* promise or agreement.

After considering the pleadings and plaintiff's evidence and the stipulation introduced upon the *first* trial (as outlined on pages 241-2 of our former opinion), we think that it may reasonably be inferred that the trial court, in directing the jury to return a verdict in defendant's favor and in entering the judgment, was of the opinion that no recovery could be had by plaintiff on the repurchase agreement sued upon because such agreement was *ultra vires* the Bank and void upon grounds of public policy. And we also think that it may reasonably be inferred that the court, in taking the action it did on the *second* hearing, after remandment of the cause, and in entering the judgment of April 15, 1932, now in question, was moved to do so because of the decision and holdings in our former opinion.

On December 22, 1933 (six days before the present writ of error was sued out to reverse the judgment now in question) our Supreme Court decided the case of *Knass* v. *Madison and Kedzie State Bank,* 354 Ill. 554. In that case the first division of this appellate court, on March 6, 1933, had affirmed a decree, with certain modifications, of the superior court of Cook county (269 Ill. App. 588, 611), and the case reached the Supreme Court on appeal and certificate of importance granted. The Supreme Court reversed the judgment of the appellate court and the decree of the superior court, and remanded the cause to the superior court "with directions to dismiss complainant's bill for want of equity" (p. 572). In that case certain bonds were sold to complainants under certain "repurchase agreements" by the bank, which are similar to the repurchase agreement in the present case, in that it is stated in one repurchase agreement: "These bonds may be cashed at any time after one year at 99 and accrued interest or in three and one-half years at par;" and in the other: "Will purchase these bonds at any time after one year at 99, and after three and one-half years at par if desired." The bank was one organized under the laws of this State, as distinguished from one organized under the laws of the United States, as is the defendant in the present case. In the opinion of the Supreme Court in the *Knass* case, after outlining the pleadings and stating certain facts, etc., it is said (p. 561): "Of first importance on this record is the question whether the repurchase agreements, assuming them to have been such and to have been made by the bank, are *ultra vires* the powers of the bank and contrary to the declared public policy of the State, and so unenforceable. This question has never been passed upon by this court."

Then follows in the opinion an exhaustive discussion of the question, accompanied with the citation of numerous adjudicated cases in this State and in other jurisdictions bearing upon it. In conclusion the Court determined the question in the affirmative. And the Court said (p. 567): "As often stated by this court, one dealing with a banking or other corporation having limited and delegated powers is chargeable with notice of those powers and their limitation." (Citing cases.) And in discussing the question whether the repurchase agreements were to be considered as being void as against public policy, the Court said in part (pp. 567-8, italics ours):

> "Are such contracts as here relied upon void as against public policy or violative of statutory enactment? Contracts against public policy are generally unenforceable by any remedy. (Restatement of the Law of Contracts, Am. Law Ins., Sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. *Agreements such as are here involved fall within that category.* Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopardize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void *though there be found no specific statutory prohibition against them.* It is an academic rule of law that from the constitution and statutory enactments may be gleaned the public policy of the State. The General Assembly of this State in 1879 passed an act entitled 'An Act for the protection of bank depositors,' approved June 4, 1879, (Smith's Stat., 1931, Chap. 38, par. 64.) Section 4 of this act is as follows:
>
> 'It shall not be lawful for any savings bank, individual or individuals doing banking business, banking company, or incorporated bank receiving savings deposit, or deposits of trust funds, to assume the payment of, or to become liable for, or to guarantee to pay the principal of, or interest on, any bonds, notes or other evidence of indebtedness of, for, or on account of any person or persons, company or incorporation; and in any as-

> sumption, liability or guarantee, whereby such deposits of trust funds could be jeopardized or impaired shall be null and void.'
>
> This section has not heretofore been construed by this court. It seems clear, however, that payment or assumption of or guaranteeing to pay bonds of the character here involved is of the gist of the prohibition of this act applicable in any case where by any such contracted liability the deposits or the trust funds of the bank could become jeopardized or impaired. The act for the protection of bank depositors evidences an intention on the part of the legislature to declare contracts of the character before us *void as against the public policy of the State.* That act, section 4 of which is herein quoted, was enacted, as the title indicates, for the protection of bank depositors. Its enactment was for the public generally and should be construed to carry out that purpose. (*People* v. *Tallmadge,* 328 Ill. 210.)"

And the Court, after disagreeing with an argument made that the quoted statute was not applicable to the particular facts, further said in part (pp. 568-9):

> "The bonds are evidences of indebtedness of the corporations which owned the real estate and executed the bonds, and by these agreements the bank's undertaking is to guarantee the bonds of those corporations. The fact that the bank may have received a commission for selling them in nowise renders the mortgage bonds obligations of the bank. It follows that agreements to repurchase them at their face value, or with a deduction of one per cent for handling, as complainants construe these agreements, are agreements to assume or guarantee the payment of the evidences of indebtedness of another corporation, contrary to the express provisions of the act for protection of bank depositors. As it cannot be doubted that such an agreement could jeopardize or impair the

> deposits or trust funds of the bank, such contract, because of its inherent danger to deposits and trust funds and because it is contrary to the public policy of the State, as evidenced by the legislative expression in section 4 of the statute quoted, is null and void."

And the Court, after stating a contention of the complainants (viz., that the old bank, having received the purchase price of the bonds in question, "is *estopped* from setting up the defense of *ultra vires*") decided against the contention, saying in part (pp. 569-70, italics ours):

> 'Under the established law of this State the defense of *ultra vires* is available to the old bank *when sued on a void agreement.* It is said, however, that the complainants performed and executed their part of the agreement, and that it would not be good faith to permit the bank now to refuse. The same question was raised in *Steele* v. *Fraternal Tribune, supra* (215 Ill. 190), where this court said (pp. 193-4):
>
> 'A contract of a corporation which is *ultra vires* in the proper sense of that term—that is to say, outside the object of its creation, as defined by the laws of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not only voidable, but *wholly void and of no legal effect.* The objection to the contract here is, not merely that the corporation *ought not* to have made it but that it *could not lawfully make it.* The contract could not be ratified by either party because it could not have been authorized by either. No performance by the parties could give the unlawful contract validity or become the foundation of any right of action upon it. * * * But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by

> assenting to it or by acting upon it, to show that it was prohibited by those laws. The powers delegated by the State to corporations are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers is chargeable with notice of those powers and their limitations and cannot plead his ignorance of their existence.' (Citing cases.)
>
> "*A contract void because it is prohibited by law can in no manner be enforced.* The law does not prohibit and also enforce a contract. (Citing cases.) Complainants are chargeable with notice that the old bank was utterly without power to make these repurchase agreements. The defense of *ultra vires* is properly urged here."

And the Court discussed, and decided adversely to them, complainants' contention that the agreements involved should not be considered as "repurchase agreements" but as "conditional sales contracts." In support of the contention complainants had cited two cases,—one of which was *Wolf* v. *National Bank of Illinois,* 178 Ill. 85 (which this appellate court had referred to and relied upon in its said former opinion in the present case.) But our Supreme Court, in its opinion in the *Knass* case, said in part (pp. 570-2, italics ours):

47 > "In the *Wolf* case the contention was that contracts similar in terms to those before us were options and gambling contracts. The court held, however, that the record showed that it was the intention of the parties that the purchaser was to be allowed a certain time in which to elect whether he was to keep or return them, and so the transaction was a conditional sale. *Such are not the facts here,* but it is evident that complainants and the bank considered that the sale was completed

> and by a separate agreement the bank agreed to repurchase the bonds. *Such does not constitute a conditional sale.* * * * The statute for the protection of bank depositors was not called to the attention of the court. *Stewart* v. *Dodson,* 282 Ill. 192 (the other case cited by complainants in the *Knass* case), involved a contract for repurchase between individuals and no question of limitation of powers arose. * * * *These cases are not controlling here.* It seems clear here that both the evidence of the transaction itself and the theory on which the bill is brought *preclude a construction of these agreements as conditional sales contracts.* Complainants' evidence shows that they *bought the bonds outright* and that in the sale of these bonds to them the title passed. * * * Complainants also received interest on the bonds sold them, which they did not offer to return when tender was made of the bonds. The purchase price was paid in full, and what the purchasers did with the bonds lay entirely with them. They were under no obligations to return them and no condition remained to be discharged in order to pass title. They could hypothecate them, sell them elsewhere, and were in nowise required to account to the bank. *These were not conditional sales.*"

On February 5, 1934 (before oral argument of the present cause was had in this court) the Supreme Court of the United States decided the case of *Texas & Pacific Railway Co.* v. *Pottorff.* The opinion is published in the Supreme Court Reporter, Vol. 54, No. 7, at pages 416-20, and it there appears in substance that the Railway Co. filed a bill against Pottorff as receiver of a *national* bank at El Paso, Texas; that Pottorff filed a cross-bill; that after evidence heard the U. S. District Court entered a decree on his cross-bill and dismissed the bill of the Railway Co.; that the decree was affirmed by the U. S. Circuit Court of Appeals (63 Fed. 2nd, 1): and that on certiorari the Supreme Court also affirmed the decree. It is stated in the opinion that "the main question for decision is whether a *national* bank has *power* to pledge a part of its assets to secure a private deposit;" that the bank failed in September, 1931, at which time the Railway Co. was and long prior thereto had been a depositor; that to secure it as such the bank, in January, 1931, had pledged $50,000 Liberty Bonds and held them for the Railway Co. in the bank's trust department; that when the bank failed the Railway Co.'s balance in its regular checking account was $54,646, of which sum it made proof of claim as a secured creditor; that the receiver approved the amount of the claim but *denied the validity of the pledge,* and he tendered a dividend check only for the amount to which the Railway Co. would have been entitled as an unsecured creditor; that thereupon the Railway Co. filed its bill against the receiver "praying, in the alternative, that the bonds be delivered to it, or that they be sold for its benefit, or that the claim be paid in full with interest;" that the receiver in his cross-bill prayed that the bank's title to the bonds be quieted; and that the District Court in its decree held that "the pledge *was void* and that the Liberty Bonds constituted assets to be administered for the benefit of the general creditors of the bank," which decree was affirmed by the Circuit Court of Appeals. It is further stated in the opinion that the Railway Co. contended (1) "that the bank had power to make the pledge; (2) that even if the bank did not have such power, the receiver is not in a position to question the validity of the pledge; and (3) that even if he is not estopped from doing so, he may not disaffirm it *without returning the consideration therefor received by the bank.*" And the Supreme Court expressed the opinion that "none of these contentions is sound." And after setting forth certain additional facts as found by the District Court, the Supreme Court made numerous holdings, which are epitomized in the syllabi of the case as reported, in substance as follows: (1) That national banks *lack power* to pledge their assets to secure private deposits; (2) that the measure of powers of such banks is statutory grant, and powers *not conferred* by Congress *are denied;* (3) that the Court takes judicial notice of facts indicating that among national banks the practice of pledging assets must have been deemed *contrary to good banking practice;* (4) that a receiver for an insolvent national bank is *not estopped* to deny the validity of a pledge of assets to secure a private deposit; (5) that no rights arise on an *ultra vires* contract, even though the contract has been fully performed; (6) that it is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so; and (7) that the receiver of an insolvent national bank may assert the invalidity of a pledge of assets to secure a private deposit without making restitution by paying the pledgee's claim in full. And the Court, as to the above propositions, Nos. 4 and 5, said (p. 420, italics ours):

> "The receiver is not estopped to deny the validity of the pledge. The railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have

no greater right. *Neither branch of the argument is well founded. The bank itself could have set aside this transaction.* It is the settled doctrine of this court that *no rights arise* on an *ultra vires* contract, *even though the contract has been performed;* and that this conclusion *cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised.*" (Citing cases.)

Counsel for the Atlas Bank, as grounds for a reversal of the present judgment, contends that the decisions and holdings in the *Knass* and *Pottorff* cases, *supra*, are decisive and controlling as to the issues here involved; that no recovery can be had by plaintiff (Awotin) by virtue of the written agreement of November 1, 1929, sued upon, and as set forth in the special count of plaintiff's declaration hereinabove mentioned; and that it should be held that the making of such an agreement was *ultra vires* the bank and against public policy and that, hence, the agreement is void and unenforceable. And counsel argues in substance that, notwithstanding the fact that in the *Knass* case the defendant was an Illinois banking corporation while in the present case defendant is a *national* bank, the respective statutes (above set forth) as to their powers, and as to the limitations on their powers, are similar, and that the decision and holdings in the *Knass* case can here properly be applied. It will be noticed that in sub-section 7 (as amended in 1927) of the National Bank Act, the proviso reads in part: "Provided, that the business of buying and *selling* investment securities shall hereafter be *limited* to buying and selling *without recourse* marketable obligations * * * in the from of bonds, notes and/or debentures, commonly known as 'investment securities,'

* * *." The terms "without recourse" or "no recourse" have well settled meanings. In Anderson's Dictionary of Law, 1893, p. 865, it is said that by the use of the former stated words "the holder of negotiable paper may transfer title without incurring the responsibility of an indorser." In Webster's New International Dictionary, 1933, p. 1785, it is said that the words, "when added to the indorsement of a negotiable instrument, protect the indorser from liability to the indorsee and subsequent holders." And in *Lyons* v. *Fitzpatrick,* 52 La. Ann. 697, 699, it is said: "Words are to be understood in their ordinary significance. 'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract."

After again considering the pleadings in the present case and the written agreement of November 1, 1929, sued upon, and in view of the decisions and holdings in said *Knass* and *Pottorff* cases, we are of the opinion that the present judgment of April 15, 1932, cannot stand because it is contrary to the law. And we are now of the belief that, when on February 23, 1932, on the former appeal, we entered our former judgment (reversing the former judgment of the circuit court in favor of defendant and remanding the cause generally), we acted erroneously.

One of the contentions here made by counsel for plaintiff is that our holdings and decision on said former appeal are "binding" upon us in the present writ of error cause. In other words the contention is in substance that, under the rule or doctrine of the

"Law of the Case," we should affirm the present judgment. We cannot agree with the contention. In 2 R. C. L., p. 226, sec. 188, in discussing the limitations of the general rule, the writer says: "The better rule, and that more in accord with justice, however, is that though ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on a second appeal, it is not an inflexible rule, and if the prior decision is palpably erroneous it is competent for the court to correct it on the second appeal. This may be said to be the view which has for its support the trend of modern authority, * * *." In *Zerulla* v. *Supreme Lodge*, 223 Ill. 518, it was decided that a proposition of law laid down by an appellate court of Illinois, upon reversing a judgment *generally* and remanding the cause, is not binding upon that court upon a second appeal, where the Supreme Court has since the first appeal decided the point involved contrary to the proposition laid down. And the Court said (pp. 519-20, italics ours):

> "Plaintiff in error contends that the law of the case was settled and announced by the appellate court the first time the case was before that tribunal and before the decision of this court in the *Seitzinger* case (204 Ill. 58) was filed, and that the law as announced by the appellate court at that time must govern the future progress and determination of this case. * * * The judgment and order of the appellate court" (on the first appeal to it, 99 Ill. App. 630, 637), "reversing and remanding the case was general in its terms and contained no directions to the trial court. It was neither final nor conclusive between the parties, no appeal could have been prosecuted from it, and it was, therefore, not *res adjudicata*. (Citing cases.) Where the appellate court or this court,

> on the first appeal to it, announces a particular view of the law governing the case and reverses and remands the case for further proceedings in accordance with the views announced, if the case is again brought before such court for review the former decision is binding on the court making it, and the questions decided and determined by it on the first appeal are not open for reconsideration on the second appeal. But while the determination of a question of law by the appellate court on the first appeal may, as a general rule, be binding upon it on the second appeal, it certainly cannot be binding on this court. *Nor would the appellate court on the second appeal,* we apprehend, *be obliged to adhere* to a proposition of law laid down on the first appeal, when this court had, *since the first appeal,* decided the *precise question* contrary to the rule announced by the appellate court. *To so hold would lead to most illogical results.''*

Reference may also be made to other adjudicated cases bearing upon the question: *Messenger* v. *Anderson,* 225 U. S. 436, 444; *Johnson* v. *Cadillac Motor Car Co.,* 261 Fed. Rep. (C. C. A.) 878, 886; *City of Hastings* v. *Foxworthy,* 45 Neb. 676, 699; *Missouri, etc. Ry. Co.* v. *Merrill,* 65 Kan. 436, 451. In the *Messenger* case it is said (p. 444, italics ours): ''In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power.''* In the *Johnson* case (p. 886) it is said, ''We recognize the full force and effect of the doctrine of *stare decisis* and the general rule that on a second appeal matters disposed of on the first appeal ordinarily will not again be considered. * * But the rule is not an inexorable one, and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society."

Another contention of plaintiff's counsel is in substance that the circuit court on the second hearing properly struck for insufficiency defendant's affidavit of merits (which accompanied its additional plea to plaintiff's declaration), and properly entered the judgment of April 15, 1932, now in question, for the reason that the affidavit stated "mere conclusions and not the essential facts." In our opinion the contention is lacking in merit. The affidavit is set forth in a foregoing paragraph of this opinion. It alleges *inter alia* that "there is not owing to plaintiff from defendant the sum of $37,085.41, or any other sum whatsoever," and that the agreement, set forth in plaintiff's declaration is "*ultra vires* and *void.*" No question was raised as to the sufficiency of the affidavit at or prior to the time of the first trial. And on the second hearing, as appears from the present judgment order, first herein mentioned, plaintiff's motion to strike said affidavit for insufficiency was apparently based "upon the remandment of the cause upon the reversal thereof by the appellate court for the first district in accordance with the opinion rendered by it." Furthermore, we think that the affidavit was sufficient to give notice to plaintiff that one of the defenses to plaintiff's action was that the repurchase agreement sued upon was *ultra vires* the bank to make, and *void* in law and, hence, unenforceable. There was sufficient notice of the nature of the defense. (See, *Firestone Tire Co.*

v. *Ginsburg,* 285 Ill. 132, 136; *Thayer* v. *Belender,* 250 Ill. App. 16, 22; *Runyan* v. *Moon,* 267 Ill. App. 312, 314.)

Plaintiff's counsel also contends that "even if it be considered that the bank in making the repurchase agreement acted *ultra vires,* plaintiff, having tendered the bonds, is entitled to recover back what he paid therefor, plus accrued interest, on an implied *assumpsit.*" It is our opinion that this contention is also without merit. Plaintiff's affidavit of claim accompanying his declaration does not disclose that he is seeking a recovery on the theory of an implied *assumpsit* after having tendered back the bonds, but rather by virtue of said repurchase agreement of November 1, 1929. Furthermore, as stated in the opinion in the *Potorff* case, *supra,* it is the settled doctrine of the Supreme Court of the United States that "no rights arise on an *ultra vires* contract even though the contract has been performed." This is also the settled law of this State as appears from the opinion in the *Knass* case, *supra,* (pp. 569-70). And we think that under said decisions and holdings plaintiff's counsel's further contention, that defendant cannot avoid the contract on the ground that it is *ultra vires* "without tendering to plaintiff the money defendant received from plaintiff" is equally without merit.

After this cause had been orally argued by respective counsel, we allowed plaintiff's counsel to file certain typewritten suggestions on points mentioned and arising on said oral argument and thereafter certain counter suggestions were filed by defendant's counsel. We have reviewed these suggestions but are of the opinion that a discussion of them is here unnecessary in view of the record before us and the decisions and holdings in said *Potorff* and *Knass* cases, *supra*.

Our conclusions are that the circuit court erred in entering against defendant the judgment of April 15, 1932, in question; that said judgment should be reversed; and that as the law will not allow any recovery to be had by plaintiff against defendant on the repurchase agreement of November 1, 1929, sued upon and as set forth in plaintiff's declaration, the case will not be remanded. Accordingly, the judgment is reversed.

REVERSED.

SULLIVAN, P. J., and SCANLAN, J., CONCUR.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1934.

No. 662

ROSE KIMEN,
Petitioner,
vs.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

Petitioner's reply to respondent's argument under Subdivision A of Point I of its brief and argument.

Counsel for the respondent has questioned the absence of the Petition for Leave to Appeal, filed in the Supreme Court of Illinois, from the transcript of record which has been filed in this Court. Under paragraph one of Rule 38 of this Court, a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed, must be filed. The record in its technical sense is made in the trial court as was done in this case and brought up to the Appellate Court of Illinois by writ of error. The proceedings in the Appellate Court of Illinois, together with this record, are included in the transcript filed in this Court.

The absence of the Petition for Leave to Appeal from the record as it has been filed in this Court is further justified, if justification be necessary, on the ground that the issues raised therein are immaterial to this Court's jurisdiction.

We are seeking a review, not of the decision of the Supreme Court of Illinois, but of the decision of the Appellate Court of Illinois, First District, and the record affirmatively shows that a federal question arising under the National Banking Act was presented to the Appellate Court; that the decision of that question was necessary to a determination of the cause—the special pleas and affidavit of merits squarely raised the issue—and the judgment could not have been given without deciding the issue.

The opinion of the Appellate Court shows that these questions were judicially determined by that Court, and in view of the refusal of the Supreme Court of Illinois to take jurisdiction of the cause, the decision of the Appellate Court upon the federal questions presented in the record, necessarily becomes the final adjudication in the State upon such federal questions. It should be noted that this Court has said that under the Illinois practice, the refusal of the Supreme Court to assume jurisdiction is tantamount to an affirmance of the decision of the Appellate Court of Illinois.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102.

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410.

No specific reason is given by the Supreme Court of Illinois (and none is required by statute) for its denial to grant petitioner's prayer for Leave to Appeal. However, the order of the Supreme Court of Illinois (Record p. 53), clearly shows that it considered the case as presented by the petition, record, abstract, brief and argument of the petitioner, and that upon due consideration thereof, the Court denied the Leave to Appeal. The element which confers jurisdiction upon this Court to issue its writ of *certiorari* as prayed, is the *denial* of the Leave to Appeal by the Supreme Court of Illinois.

> *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 21.

The case of *Lynch* v. *New York, ex rel. Pierson,* 79 L. ed. Adv. Op. 1, cited in respondent's brief at page two, is entirely without application. In that case, this Court was asked to review the decision of the New York Court of Appeals, which was the highest court in the State of New York, and from that decision it could not be determined that the court had decided the case on a federal or non-federal question.

In the case at bar, we are seeking to obtain a review of the decision of the Appellate Court of Illinois, which has become the decision of the highest Court of the State of Illinois, so far as this cause is concerned. As we have stated before, we are not seeking a review of the decision of the Supreme Court of Illinois. The essentials of the jurisdiction of this Court to review the decision of the Appellate Court of Illinois have been met.

Petitioner's reply to respondent's argument under Subdivision B of Point I of its brief and argument.

It is contended by the respondent under this subdivision of its argument that the petitioner did not pursue the proper method of invoking the jurisdiction of the Supreme Court of Illinois; that had another method been employed, the State Supreme Court might have assumed jurisdiction, and that, therefore, this Court has no jurisdiction.

A sufficient and complete answer to this contention is found in the fact that the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal shows that the State Court had considered the petition, record, abstract, brief and argument filed by the petitioner and overruled the prayer thereof, denying "a Leave to Appeal" (Rec. p. 53). Had the petitioner herein pursued the wrong method in seeking to invoke the jurisdiction of the State Supreme Court as claimed by the respondent, the Petition for Leave to Appeal would have been *dismissed without consideration* and not denied after a consideration of the petition, record, abstract, brief and argument, as shown by the order of the said Supreme Court of Illinois.

We repeat as applicable here what we have already said in reply to respondent's argument in sub-section A of Point I of its brief, namely, that the jurisdictional element with which this Court concerns itself in applications for writs of *certiorari* is the *refusal* of the highest state court to take jurisdiction.

Chesapeake & Ohio R. R. Co. v. *Mihas,* 280 U. S. 102.

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock,* 279 U. S. 410.

American Railway Express Co. v. *Levee,* 263 U. S. 19, 21.

An analysis of the cases cited by respondent in support of its contention that this Court has no jurisdiction of this case will instantly reveal that they are without application to the case at bar.

In *Mullen* v. *Western Springs Beef Co.*, 173 U. S. 116 (cited in respondent's brief as 123 U. S. 116), this Court held that it had no jurisdiction to review the decision of the Court of Appeals of Colorado.

It appears in that case that the Supreme Court is the highest court in the State and that it had jurisdiction to review the decision of the Court of Appeals had an application for such review been made to it; and that no such application had, in fact, been made. Clearly, this Court could not have reviewed the decision of the Court of Appeals, because it had not yet become the decision of the highest court in the State of Colorado from which one could have been had.

The case of *Atlantic Coast Line R. R. Co.* v. *Mims,* 242 U. S. 532, is one wherein this Court dismissed a writ of error for the reason that no federal question had been presented to the Supreme Court of South Carolina, whose judgment this Court was asked to review.

It appears that in the *Mims* case, the trial court had rejected an offer of certain evidence which raised a federal question. The State Supreme Court sustained that ruling and it is this decision sustaining the trial court that the defendant sought to have this Court review on writ of error. Under the pleadings in the case, no federal question had been raised and the offer of evidence was made at the second trial, after the plaintiff had completed her case.

Clearly, no federal question was decided either by the trial court or the Supreme Court of South Carolina. The sole question decided by the Supreme Court of South Carolina was one of the local law governing procedure. This Court properly refused to review a decision on such a question.

In the case of *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 490, a writ of *certiorari* was prayed for the purpose of reviewing the decision of the Supreme Court of Missouri. This court dismissed the writ on the ground that no federal question had been presented to or decided by said Supreme Court of Missouri.

The facts in the case show that a question arising under the Constitution of the United States was raised for the first time in the appellate court, an intermediate court, in the defendant's brief and argument. The Supreme Court of Missouri held that the question was not properly raised under the law of Missouri and thus, like the Supreme Court of South Carolina in the *Mims* case, decided a question of procedure under local law and not a federal question.

Finally, the respondent cites and quotes from the case of *Newman* v. *Gates*, 204 U. S. 89, wherein this Court dismissed a writ of error to the Supreme Court of Indiana to review a decision of that Court which was that an appeal from the trial court to the appellate court, an intermediate court, was insufficient.

Again this Court properly held that it had no jurisdiction to review the decision of the Supreme Court of Indiana for the reason that it was based not upon a federal question, but purely on a matter of procedure under the local law of Indiana.

In none of the foregoing cases was a federal question decided by the Court whose decision this Court was asked to review. In the case at bar, as we have already pointed out, we are asking this Court to review a decision of the

Appellate Court of Illinois, which squarely decided a federal question and which, by the Supreme Court's denial of Leave to Appeal, became the decision of the highest court in the State of Illinois from which a decision of such federal question could be had.

Petitioner's reply to respondent's argument under Subdivision C of Point I of its brief and argument.

Counsel for the respondent here argues that a federal question of substance is not presented to this Court by the record in this case.

In our original brief, we cited cases in support of our contention that the liability of a national bank, under the National Banking Act, upon an implied contract to repay moneys received by it in reliance upon an *ultra vires* contract, is a federal question. Counsel for respondent says that these cases cannot be deemed as authorities in support of this Court's jurisdiction because they were decided when writs of error were granted by this Court as a matter of right.

We respectfully submit that the fact that writs of error were granted as a matter of right at the time these cases were decided does not alter the fact that this Court would not have granted the writs if no federal question had been involved. A writ of error like a writ of *certiorari* is only the vehicle by which a federal question is brought to this Court for review.

Whether the federal question presented herein is a matter of substance, we believe is undeniably answered by a mere statement of the proposition, namely: Is a national bank liable under the National Banking Act, in general assumpsit, to repay moneys received by and paid to it in reliance upon its *ultra vires* contract? Surely, there can be no serious doubt in any one's mind that a determination and definition of the extent of a national bank's liability under the National Banking Act is a very substantial question.

Petitioner's reply to respondent's argument under Subdivision D of Point I of its brief and argument.

Under this subdivision of his argument, counsel for the respondent states that the decision of the Appellate Court of Illinois in this case is in accord with the applicable decisions of this Court and in support of this statement counsel cites the cases of *Texas & Pacific Railway Company* v. *Pottorff*, 291 U. S. 245, and *Cassatt, et al.* v. *First National Bank of West New York* (N. J.), 168 Atl. 585 (*certiorari* denied by this Court, 291 U. S. 660).

It is curious to note that counsel cites two cases which are clearly inapplicable to the case at bar and does not in any manner distinguish the cases cited by us in our original brief, and which unequivocally announced the principle that a national bank is liable on the implied contract theory for the benefits received by it upon the strength of its *ultra vires* contract.

We shall not consider the *Pottorff* case, *supra*, 291 U. S. 245, because in our original brief, we have pointed out in detail the distinctions which exist between it and the case at bar.

The *Cassatt* case (N. J.), *supra*, 168 Atl. 585, we believe is without application, because it holds that a national bank cannot act as a broker in the purchase of stocks. It does not hold that a national bank is not liable for moneys which it has received under an alleged *ultra vires* contract.

Petitioner's reply to respondent's argument under Subdivision A of Point II of its brief and argument.

The contention of counsel for the respondent on this branch of his argument is that the petitioner is not entitled to recover, in general assumpsit, upon the implied contract theory the moneys paid to the respondent by the petitioner in reliance upon the repurchase contract, because that contract is illegal and against public policy.

At the outset, we wish to call to the Court's attention that we accept the theory that the repurchase contract in this case is *ultra vires* only because it proceeded in the trial court upon that theory. The petitioner accepted the respondent's repudiation of the contract on the ground it was *ultra vires.* We do not wish, however, to be foreclosed in resisting the theory that a contract similar to the one involved in this case is *ultra vires,* nor do we wish to be deemed as having assumed inconsistent positions when we so argue in the case of *Awotin* v. *Atlas Exchange National Bank of Chicago,* pending in this Court's docket as cause No. 661. This case and the *Awotin* case are before the Court on different records.

Counsel for the respondent, in arguing this branch of the cause, relies upon the case of *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554, but that case is not in point, because it appears therein that when the defendant bank sold the bonds subject to a repurchase agreement, it was acting as a broker. The bank did not retain the proceeds of the sale, but delivered them to the maker of the bonds, its principal, less, of course, a commission for acting as a broker. The Illinois Supreme Court may have been justified in using the language cited by counsel in his brief on page 10, but because of the factual difference, that language is not applicable to the case at bar.

In the case before this Court, when the respondent sold the bonds to the petitioner, it was acting on its own account and retained the entire proceeds for its own benefit. These facts create an entirely different situation than is found in the *Knass* case, because the respondent, in selling its own assets with the agreement to repurchase them, merely substitutes a new asset for the old. If called upon to repurchase the bonds, the respondent would merely be putting itself and the petitioner in *statu quo.*

So far as any danger resulting from creating a contingent liability is concerned, that element is not present in the case at bar, because the respondent, having received the full purchase price of the bonds and knowing that it may be called upon to repurchase them, can very readily set up a reserve against such contingency, just as banks set up reserves to protect themselves from losses on loans and the depreciation of furniture and fixtures. The bank's negligence can not convert an otherwise innocuous transaction into a dangerous one.

The other cases cited by counsel for the respondent in support of his argument that the petitioner is not entitled to recover the money paid by her, are clearly not in point when we consider that the contract in question is not violative of any public policy or statutory enactment. The cases cited by counsel hold that there can be no recovery on the *quantum meruit* where a contract is illegal, and also hold that the law will leave parties to an illegal contract where it finds them and will not give to either party any relief, are not in point, because the contract in the case at bar does not violate any public policy and is not illegal or immoral, as we have already indicated.

Thus depriving the contract of any element of illegality and purging it of any taint of being contrary to public policy, the repurchase contract stands as merely being *ultra vires,* and the language used by this Court in the case of *Pullman's, etc., Co.* v. *Central Transportation Co.,* 139 U. S. 24, is particularly applicable, when it said on page 60;

> "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it; the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.
>
> "In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

Respondent also argues that there is nothing in the record in this case to show any benefit received by it out of the original transaction. "Benefit" as it is used in this connection, does not mean "profit." When the petitioner paid her money to the respondent upon the inducement of the repurchase agreement, the money of the sale and the repurchase agreement constituted a single transaction, and the money thus paid to and received by the respondent was the benefit which it received. It is not necessary to show that in selling the bonds the respondent made a profit.

We believe that only a casual reading of the case of *Coon* v. *Smith,* 4 Fed. Supp. 960, will convince the Court that the Judge predicated his decision on the right of the plaintiff in that suit to recover on the implied contract as well as, and not solely, upon the proposition laid down by the Appellate Court of Illinois in the case of *Awotin v. Atlas Exchange National Bank,* 265 Ill. App. 238.

Petitioner's reply to respondent's argument under Subdivision B of Point II of its brief and argument.

In this branch of respondent's argument, it is stated that to permit the respondent to recover upon an implied *assumpsit* would be substantially to permit her to recover on the *ultra vires* contract. We respectfully submit that if the amount of money to which she would be entitled under an implied *assumpsit* is substantially the same amount of money which she could recover upon the written agreement, that alone is not sufficient to deny her a recovery.

CONCLUSION.

In conclusion we respectfully submit that this Court has jurisdiction to issue its writ of *certiorari* to the Appellate Court of Illinois, First District, as prayed in the Petition for a writ of *certiorari* filed in this case; that the petitioner is entitled to recover the money paid by her to the respondent in reliance upon a contract which it has repudiated as being *ultra vires,* and that this Court, in the exercise of its jurisdiction, should issue its writ of *certiorari.*

Respectfully submitted,

Samuel A. Ettelson,
Edward C. Higgins,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1934.

No. 662

ROSE KIMEN,
Petitioner,
vs.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,
Respondent.

On Writ of Certiorari.

Petitioner's Brief and Argument.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 662

ROSE KIMEN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI.

Petitioner's Brief and Argument.

To the Honorable Supreme Court of the United States:

This cause is now before this Honorable Court on a writ of *certiorari* granted March 4, 1935, to review the judgment of the Appellate Court of Illinois, First District, reversing the judgment of the Circuit Court of Illinois entered in favor of the petitioner and against the respondent.

I.

Opinion of the Court Below.

The opinion of the Appellate Court of Illinois, First District, is not officially reported. An abstract report of the decision of said Court is reported in 275 Ill. App. 638. The full opinion rendered by said Court may be found in the Transcript of Record filed herein, beginning at page 69.

II.

Jurisdiction of this Court.

The question of this Court's jurisdiction to review the decision of the Appellate Court of Illinois, First District, was presented and argued by both parties on petition for writ of *certiorari*. This Court decided in favor of its jurisdiction and granted the writ. The case is now before the Court for review on the merits and we, therefore, feel that the jurisdictional question is closed and no further argument need be made on that behalf. We, however, will restate the grounds of this Court's jurisdiction so that we strictly comply with the Court's rules.

The petitioner respectfully represents to this Honorable Court that this case involves a Federal question, namely, the rights, privileges, immunities and the extent of liability, if any, of a national banking association organized and existing under the laws of the United States.

> *First National Bank etc.* v. *Alexander Anderson,* 172 U. S. 573.
>
> *Leander J. McCormick* v. *Market National Bank of Chicago,* 165 U. S. 538.
>
> *Logan County National Bank* v. *Townsend,* 139 U. S. 67, pp. 72, 73.

It follows from the fact that this case involves a Federal question and from the further fact that the decision of the Appellate Court of Illinois, First District, is from the highest court of the State of Illinois in which a decision in this case can be obtained, that this Court has jurisdiction to review the decision of said Appellate Court of Illinois.

> *Chicago & Eastern Illinois R. R. Co. v. Industrial Commission of Illinois*, 284 U. S. 296, 297.
>
> *Chesapeake & Ohio R. R. Co.* v. *Mihas*, 280 U. S. 102, 104.
>
> *Minneapolis, St. P. & S. S. Ry. Co.* v. *Rock*, 279 U. S. 410.
>
> *American Railway Express Co.* v. *Levee*, 263 U. S. 19.

III.

Statement of the Case.

The petitioner respectfully represents that in the trial court she was the plaintiff and the respondent was the defendant.

The uncontradicted facts shown by the evidence are: That the respondent, by its cashier, solicited the petitioner to purchase four One Thousand Dollar ($1,000) par value First National Company real estate bonds; that the price at which such bonds were first offered for sale was Ninety-eight Dollars ($98.00) per hundred and accrued interest; that the petitioner refused to purchase them, stating to said cashier that she needed her money, and that she knew nothing about the bonds; that said cashier then offered, on behalf of the respondent, to repurchase said bonds from the petitioner if she would buy them; that the petitioner agreed to make the purchase, provided said offer to repurchase was reduced to writing; that said cashier stated that if said agreement was reduced to writing, the bonds would cost Ninety-eight and one half Dollars ($98.50) per hundred, and accrued interest, which price the petitioner agreed to and did pay and which aggregated the sum of Four Thousand Four Dollars and Forty-seven Cents ($4,004.47); and that in return therefor, the petitioner received the four bonds and a written contract wherein the respondent agreed to repurchase the same at their maturity at par and accrued interest. At the maturity thereof, the petitioner called upon the said cashier, on behalf of said respondent, to repurchase said bonds, but that said respondent refused so to do. (Rec. pp. 13-23)

The petitioner instituted an action in assumpsit filing a special count for the breach of the written contract and common counts in general assumpsit. (Rec. p. 1)

The respondent having filed a special plea alleging in substance that the written contract was *ultra vires* the respondent under the National Bank Act (Rec. p. 6), the petitioner filed an additional count in general assumpsit for the recovery of the moneys paid by her to the respondent for the bonds and the repurchase agreement. (Rec. p. 8)

After a trial before a jury, the trial court entered a judgment in favor of the petitioner and against the respondent upon a verdict for the petitioner in the sum of Four Thousand Four Dollars and Forty-seven Cents ($4,004.47) and accrued interest, this being the amount paid by the petitioner for said bonds and written contract. (Rec. p. 13)

On June 15, 1934, the Appellate Court of Illinois, First District, on writ of error sued out to the Circuit Court of Cook County, reversed said judgment and, without remanding, entered its own judgment against the petitioner. (Rec. p. 63)

On October 23, 1934, the Supreme Court of Illinois denied to the petitioner a leave to appeal to said Supreme Court of Illinois from the judgment of the Appellate Court of Illinois, First District, (Rec. p. 80), and by virtue of sub-section (2), Section 75, Article VIII of the Illinois Civil Practice Act (Cahill's Ill. Rev. St., 1933, chap. 110, par. 203) (See Appendix), said judgment of the Appellate Court of Illinois became final.

IV.

Specifications of Error.

The errors on account of which the judgment of the Appellate Court of Illinois, First District, should be reversed are as follows, to wit:

1. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in finding and holding that the petitioner was not entitled to recover from the respondent on an implied assumpsit, the moneys paid by the petitioner to said respondent in reliance upon said void contract and agreement.

2. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in not finding and holding that the petitioner was entitled to recover from the respondent herein on an implied assumpsit, the moneys paid by the petitioner to said respondent in reliance upon said void contract and agreement.

V.

Summary of Argument.

A. The petitioner is entitled to recover from the respondent, in general assumpsit, the moneys which she paid to said respondent for the purchase of the First National Company bonds in reliance upon the respondent's agreement to repurchase said bonds, which agreement said respondent repudiated as being ultra vires under the National Bank Act. (44 Stat. 1226.)

VI.

Argument.

A. The petitioner is entitled to recover from the respondent, in general assumpsit, the moneys which she paid to said respondent for the purchase of the First National Company bonds in reliance upon the respondent's agreement to repurchase said bonds, which agreement said respondent repudiated as being ultra vires under the National Bank Act. (44 Stat. 1226.)

The agreement of the respondent, in reliance upon which the petitioner purchased the bonds in question, provided in substance, "should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $4,000 and accrued interest," (Rec. p. 3) and when the respondent was called upon to perform its said contract and to repurchase said bonds, it repudiated its agreement on the ground that it had no power under the National Bank Aet (44 Stat. 1226) to make such a contract.

The National Bank Act (44 Stat. 1226) provides:

> "* * * Provided, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations, evidencing indebtedness of any person, co-partnership, association or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities * * * ."

We do not concern ourselves in the argument of this case with the question whether in fact the respondent did have the power to make such a contract. The case proceeded in the trial court on the theory that the respondent, having repudiated its agreement as being *ultra vires,* is liable in general assumpsit for the amount of money paid by the petitioner in reliance upon the alleged *ultra vires* agreement. (Rec. pp. 8, 23, 39, 41) We, therefore, present our case to this Court on the assumption that the contract is *ultra vires,* but we respectfully submit that the petitioner is nonetheless entitled to recover in this action the money paid by her for said bonds.

It is a well-settled rule of law often decided by this Court, that a corporation, which has repudiated a contract as being *ultra vires,* is not permitted to retain the benefits which it has received under such a void agreement, but that it is liable therefor upon an implied assumpsit.

Central Transportation Co. v. *Pullman, etc., Co.,* 139 U. S. 24, 60.

Logan County National Bank v. *Townsend,* 139 U. S. 67.

Pullman Car Co. v. *Central Transportation Co.,* 171 U. S. 138, 151.

Aldrich v. *Chemical National Bank,* 176 U. S. 618.

Citizens' Central National Bank v. *Appleton,* 216 U. S. 196.

Coon v: *Smith,* 4 Fed. Supp. 960.

This doctrine for which we contend is distinguishable from the general rule announced by this Court that a corporation may not be estopped to plead the defense of *ultra vires* and that no rights arise out of an *ultra vires* contract (*Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245). The petitioner's right of recovery in this case is predicated upon the theory that the respondent corporation, having received money under a void agreement, is not, in equity and good conscience, entitled to retain the money and at the same time repudiate the obligations of the contract.

The case of *Citizens' Central National Bank* v. *Appleton*, *supra*, 216 U. S. 196, is one wherein a National Bank to which one Samuels was indebted in the sum of Ten Thousand Dollars ($10,000), induced another bank to lend Twelve Thousand Dollars ($12,000) to Samuels and guaranteed the repayment of the loan. Samuels had prior thereto agreed to pay the National Bank Ten Thousand Dollars ($10,000) out of the Twelve Thousand Dollars ($12,000) loan. When sued on the guaranty, the National Bank defended on the ground that a guaranty was beyond its powers and in violation of the national banking laws. Of this defense, the Court said, on page 202:

> "But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank * * *. The law would be very impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. * * * In short, the Central National Bank, by means of the device mentioned, got Ten Thousand Dollars ($10,000) * * * for its own benefit, and having used it for its own benefit,

> it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief.".

The Court then reviewed and discussed with approval the cases last cited by us in support of this point. For that reason, the *Appleton* case, *supra,* 216 U. S. 196, is important.

The case of *Coon* v. *Smith,* 4 Fed. Supp. 960, is directly in point upon the question of the right of the petitioner to recover, in general assumpsit, the moneys paid in reliance upon a repurchase agreement which the District Court in that case held to be *ultra vires.* We do not agree with the opinion of the learned Judge that a national bank has no authority to enter into a repurchase agreement, but his opinion contains a complete discussion of the authorities which support our contention, *i. e.,* that the petitioner is entitled to recover, on the implied assumpsit, the moneys paid by her in reliance upon the agreement which the respondent repudiated as being *ultra vires.*

The case of *Texas & Pacific Ry. Co.* v. *Pottorff, supra,* 291 U. S. 245, cited by the Appellate Court of Illinois in support of its proposition that the petitioner could not recover, in general assumpsit, the moneys paid in reliance upon the repurchase agreement, clearly does not sustain that proposition. There is nothing in the facts of the *Pottorff* case, or in what this Court said in its opinion, that is in conflict, either directly or indirectly, with the cases last cited by us.

In the *Pottorff* case, this Court said that a national bank could not be estopped from defending an action on a contract on the ground that it was *ultra vires*, and that *if the doctrine of the recovery of the benefits obtained by means of an* ultra vires *contract were applicable* (to the facts in the *Pottorff* case), the complainant therein would still not be entitled to recover the full amount of its deposit in the defunct bank, because,

> "*the argument if applicable would not help the Railway.* Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable *res* and a constructive trust based on special circumstances of misconduct, confer a preference over other creditors. The pledge here challenged having failed because illegal, the Railway is entitled only to a dividend as a general creditor. Its right thereto is conceded." (Italics our own)

In the case at bar, we do not claim any recovery upon the contract; we do not claim that the respondent is estopped to plead the defense of *ultra vires;* we contend only that in law, the respondent is liable for the money received from the petitioner in reliance upon an alleged *ultra vires* contract.

In opposing any recovery by the petitioner on the implied assumpsit, the respondent has urged that the repurchase contract is illegal and contrary to public policy, and, therefore, that the law will not give any relief to her, but will leave the parties where it finds them.

In support of this theory, the respondent relies upon certain language used by the Supreme Court of Illinois in the case of *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554, and also upon certain language found in the National Bank Act. (44 Stat. 1226)

In the *Knass* case, *supra,* 354 Ill. 554, the Supreme Court of Illinois said:

> "Are such contracts as here relied upon void as against public policy or violative of statutory enactment? Contracts against public policy are generally unenforceable by any remedy. (Re-statement of the Law of Contracts, Am. Law. Ins., sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. Agreements such as are here involved fall within that category. Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopardize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void though there be found no specific statutory prohibition against them."

We are assuming, as we have heretofore stated, that the repurchase contract is *ultra vires,* but we respectfully submit that there is nothing in the contract, in its effect, or in the circumstances surrounding it which renders it contrary to public policy.

The Supreme Court of Illinois held the contract in the *Knass* case against public policy because it said that contracts of such character endangered the financial structures of banks and were thereby detrimental to the depositors and the public at large.

The Illinois Court indicated that the bank in that case was acting as a broker when it sold the bonds to the complainant. The Court said, on pages 568 and 569 of its opinion: "The fact that the bank may have received a commission for selling them (the bonds) in no wise renders the mortgage bonds obligations of the bank" and "it will be presumed that the mortgagor, * * * received the amount paid by the claimants (complainants in the case) less commissions charged for the sale." It follows that the bank did not receive, for its own use and benefit, the purchase price paid for the bonds. The money was paid over to the maker of the bonds. Under these facts, when the bank attempted to obligate itself to repurchase the bonds, it did not receive an asset sufficient to meet its obligation if it matured.

The facts in the case at bar disclose an entirely different situation and one wherein the dangers alluded to by the Illinois Court are not present.

In the case at bar, the respondent must be regarded as having been the owner of the bonds which it sold to the petitioner, since selling property is an act of ownership, unless the contrary is shown. *Farmers' & Merchants' State Bank* v. *Mellum, et al.,* 173 Minn. 327, 212 N. W. 308. The record in the case at bar does not disclose that when the respondent sold the bonds to the petitioner, it was acting in any other capacity but as the owner of them. Being the owner of the bonds, the respondent received and retained, for its own use, the moneys which the petitioner paid for the purchase of said bonds in reliance upon the repurchase contract. Reduced to simple terms, the transaction resulted in the respondent substituting cash among its assets in the place of the bonds. At the same time that the respondent incurred a liability to repurchase the bonds, it received an asset equivalent to the liability and sufficient to offset and pay it at its maturity.

The bank could very readily have protected itself, its stockholders, creditors, and the public at large by creating a reserve against the contingency of the maturity of any liability on the repurchase contract.

Considering now the claim that the contract is illegal because it violates a statutory prohibition, we respectfully submit that if the contract is deemed to afford recourse so as to constitute the original sale one with recourse, it does not violate any statutory prohibition.

The National Bank Act limits the powers of the respondent to sell investment securities to doing so without recourse. The power to sell with recourse is withheld from national banks, and when the respondent sold the bonds to the petitioner with recourse against it, the respondent was exercising a power not granted by the statute, but it was not violating any statutory prohibition, in the sense of the words, that would give rise to an occasion for this Court to apply the doctrine that the law leaves parties to an illegal contract where it finds them.

All corporations are limited in the exercise of powers to those granted in the statute pursuant to which they are organized and while the exercise of powers not granted makes the contract *ultra vires* and unlawful and void, still this Court has always permitted the recovery of property and money parted with on the faith of a contract unlawful as being *ultra vires*. *Pullman's, etc., Co.* v. *Central Transportation Co.*, 139 U. S. 24.

The language in the opinion of this Court in the case of *Pullman's, etc., Co.* v. *Central Transportation Co.*, 139 U. S. 24, is particularly applicable to the case at bar, where it is said on page 60:

> "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making

> it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.
>
> "In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.'"

We respectfully submit that even if the repurchase contract made by the respondent is *ultra vires,* as we have *assumed* that it is, it is not illegal or contrary to public policy.

VII.

CONCLUSION.

We respectfully submit that we have shown that even if the repurchase agreement is *ultra vires* and void, the petitioner is entitled to recover from the respondent in general assumpsit the moneys which she paid to the respondent for the purchase of the First National Company Bonds in reliance upon the respondent's agreement to repurchase said bonds, which agreement said respondent repudiated as being *ultra vires* under the National Bank Act, and that in holding that the petitioner was not entitled so to recover, the Appellate Court of Illinois, First District, erred. We, therefore, pray that the judgment of said Appellate Court of Illinois, First District, reversing the judgment of the Circuit Court of Cook County, be reversed by this Honorable Court.

Respectfully submitted,

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APPENDIX.

Illinois Civil Practice Act, sub-section (2) of Section 75, Article VIII (Cahill's Ill. Rev. St. Chap, 110, Par. 203):

> "In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court; *Provided, however,* that in action *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen hundred

dollars ($1500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court: *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."

FILE COPY

No. 662

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CHARLES ELMORE CROPL

CLERK

IN THE

Supreme Court of the United States

October Term, A. D. 1934.

ROSE KIMEN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO,
a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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I.

JURISDICTION OF THIS COURT.

A.

For this Court to assume jurisdiction it must affirmatively appear from the record that the Federal question was presented to and necessarily decided by the Supreme Court of Illinois.

Petitioner has not seen fit to include in the record presented to this Court any of the pleading and proceeding first rule thereof deals with the applicability of the Civil Practice Act. This Rule No. 1 is as follows:

> "APPLICABILITY OF CIVIL PRACTICE ACT.
>
> Rule 1. All provisions of the Civil Practice Act with respect to review in civil proceedings by the Supreme or Appellate Courts shall apply to orders, determinations, decisions, judgments or decrees entered by trial courts on or after January 1, 1934. All suits in which a summons has been issued prior to January 1, 1934, but in which no pleadings have been filed by either party prior thereto, shall be governed by the Civil Practice Act. The provisions of the Civil Practice Act with respect to service of process issued on or after January 1, 1934 (sections 6, 10, 13-19), appearance (section 20) and trial practice (sections 48-73) shall apply to proceedings instituted prior to January 1, 1934, and not on trial prior to that day. Except as provided by this rule, or by written stipulation of parties, or by order of the court, upon notice and motion, proceedings instituted prior to January 1, 1934, shall not be governed by the Civil Practice Act."

Rule No. 71 provides that:

> "These rules shall be in effect January 1, 1934, and be in lieu of all rules in the schedule to the Civil Practice Act, and of all other rules of this Court heretofore in force."

It thus appears that the procedure adopted by petitioner in following the Civil Practice Act and asking *"leave to appeal"* to the Illinois Supreme Court was not the proper practice as provided by law and the Supreme Court's denial of *"leave to appeal"* was not necessarily a refusal to review the judgment of the Appellate Court or an indication that it would not so review it if its jurisdiction had been properly invoked.

Prior to January 1, 1934, the method of reviewing decisions of the Appellate Courts by the Supreme Court was controlled by the Practice Act of 1907 (CAHILL'S ILLINOIS

Revised Statutes, 1933, Appendix LVI). This Act was repealed by Section 94 of the Civil Practice Act with the provision, however, that "nothing in this provision for repeal shall impair or affect any action or proceeding commenced before this Act shall have taken effect" (Chapter 110, Section 222, Cahill's Illinois Revised Statutes, 1933).

Under the Practice Act of 1907 (Chapter 110, Section 120, Cahill's Illinois Revised Statutes, 1933, Appendix LXXVI), it is provided that the method of securing a review by the Supreme Court of a judgment of the Appellate Court shall be by the Supreme Court granting on application a writ of certiorari requiring the Appellate Court to certify the case to the Supreme Court for its review and determination.

No request was made by petitioner to the State Supreme Court that it grant its writ of certiorari in this case, and in the absence of such a request it cannot be contended that the exercise by the State Supreme Court of the discretion placed in it by the State laws had been invoked.

In the proceedings before the State Supreme Court this respondent called to the Court's attention, by its answer to petitioner's application for leave to appeal, the fact that there was no authority or legal basis for the procedure adopted by petitioner. It cannot therefore be presumed that the Court's action was not prompted wholly by this fact and that if its discretionary power had been properly invoked it would not have granted the writ of certiorari, assumed jurisdiction, and determined the questions involved upon their merits.

For this Court to assume jurisdiction it must affirmatively appear from the record that a decision could not be had in the highest State Court upon the federal question involved. *Mullen* v. *Western Springs Beef Co.*, 123 U. S. 116.

It is well settled by the decisions of this Court that it will review the final decision of the highest court of a state only when the Federal right claimed has been asserted in a manner calling for a decision by such highest court under its established system of practice and pleading.

> *Atlantic Coast Line Railroad Company* v. *Mims*, 242 U. S. 532.
>
> *Hartford Life Ins. Co.* v. *Johnson*, 249 U. S. 490.

In *Newman* v. *Gates*, 204 U. S. 89, a judgment was entered in the State trial court against three persons. After judgment one of the judgment debtors died and the survivors appealed to the Appellate Court of the State without making the personal representative of the decedent a party thereto. The Appellate Court affirmed the judgment but the State Supreme Court on removal of the cause to that Court held that the appeal was defective because of failure to make the personal representative of the decedent a co-appellant, and dismissed the appeal without a determination upon the merits.

Upon a motion made in this Court to dismiss the writ of error under which the cause was brought here, this Court at page 95 said:

> "The removal of the cause from the Appellate Court into the Supreme Court of Indiana vacated the decision of the former tribunal, and after transfer the case stood in the highest court of Indiana as though it had been appealed to that court directly from the trial court. *Oster* v. *Broe*, 161 Ind. 114, 64 N. E. 918. Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdic-

tion of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such questions, when rendered by the highest court of a state in which a decision in the suit could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Writ of error dismissed."

C.

There is in the case at bar no substantial Federal question.

Petitioner cites on page 8 of his petition three cases involving national banks where the decisions of State courts were reviewed by this Court, and urges that these cases are indicative that questions involving the powers and obligations of national banks under their charters are federal questions entitling the parties thereto to a review in this Court. These cases were brought to this Court by writs of error at a time when the issuance of such writs was a matter of right. Since the amendment to the Judicial Code in 1916 such questions are now, reviewable only when this Court has in the exercise of its discretion determined that they are substantial and of sufficient importance to warrant the review. We do not believe that there is here any such substantial federal question.

In this case the petitioner purchased and received from the respondent bank certain mortgage bonds for which she paid cash. In connection with this purchase the cashier of the bank gave to petitioner a written repurchase agreement dated November 1, 1929 (Rec., 3), in which, after acknowledging the sale of the bonds and the price received therefor, he stated as follows:

> "Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000.00 and accrued interest."

The only federal question involved in this case was whether this repurchase agreement was *ultra vires* as being in violation of the express provision of Section 5136 of the National Bank Act as amended in 1927, wherein after enumerating the powers granted to national banks, it is provided:

> "That the business of buying and selling investment securities shall hereafter be limited to buying and selling *without recourse* marketable obligations evidencing indebtedness of any person, co-partnership, association or corporation, in the form of bonds, notes and/or debentures commonly known as investment securities."

But this Federal question was taken out of this case by the express waiver of petitioner in her petition to the Illinois Supreme Court for leave to appeal, as we have shown under Section I-A of this brief. And attorneys for petitioner consistent with such waiver have failed in their petition here to urge the validity of the repurchase agreement but have impliedly admitted that it is *ultra vires* and void and are basing their claim solely upon a "general assumpsit".

It follows that petitioner is not bringing here for decision any Federal question whatever. The question as to whether she is entitled to recover in assumpsit for money had and received does not involve the assertion by her of a right under a Federal statute.

D.

If the question of ultra vires were still involved, the decision of the State court is in accord with the applicable decisions of this Court.

Texas & Pacific Railway Company v. *S. O. Pottorff*, 291 U. S. 245, is an applicable decision by this Court of issues similar to those involved in the pending case. That case involved the validity of a pledge of assets of a national bank to secure a private deposit. This Court there held that national banks lack the power to make such a pledge because it is not conferred by Congress; that no estoppel arose out of the obtaining of such a deposit by the pledge of assets, and that such *ultra vires* contract even though fully performed gave rise to no rights thereon and did not estop the bank from challenging the legality of the power exercised.

In *Cassatt, et al.* v. *First National Bank of West New York*, 291 U. S. 660, this Court on January 15, 1934, denied a writ of certiorari to review the decision by the New Jersey Court of Errors and Appeals reported in 168 Atl. 585. That case involved the right of a national bank to purchase stock in another corporation and in that connection the New Jersey Court considered the 1927 Amendment to the National Bank Act. That court held against the power claimed and in its discussion of the issues gave attention to questions similar to the ones here involved and held that it was a contradiction of terms to say that a national bank which has no power whatever under the law to purchase speculative securities directly, may, nevertheless, make itself liable as a purchaser by acting as an agent for a customer of the bank as such conclusion would nullify the purpose of the statutory limitation of its powers, which is to conserve the rights of its depositors and stockholders and enable it to perform unimpaired its functions as an agency of the Federal government. It further held that persons dealing with national banks are charged with limitation of their powers. These cases of very recent date indicate clearly that the decision of the State court in the case at bar is clearly in accord with the attitude of this Court.

II.

IMPLIED ASSUMPSIT.

A.

The repurchase agreement was against public policy and prohibited by statute, of which plaintiff was chargeable with notice. The courts will not give assistance to either party to such transactions but will leave them where it finds them.

In its opinion the Appellate Court quoted from the opinion in the case of *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554, where the Court at pages 567-8 said:

> "Are such contracts as here relied upon void as against public policy or violative of statutory enactment? Contracts against public policy are generally unenforceable by any remedy. (Re-statement of the Law of Contracts, Am. Law. Ins., sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. *Agreements such as are here involved fall within that category.* Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopar-

> dize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void *though there be found no specific statutory prohibition against them.*"

In the case at bar as in the *Knass* case there was also a statutory prohibition against agreements of this character. It was provided by an amendment made in 1927 to the National Bank Act, Section 5136, under which the defendant was organized, that the business of the bank in buying and selling investment securities,

> "shall hereafter be limited to buying and selling without recourse marketable obligations."

It thus appears that the repurchase agreement in question is against public policy and illegal both because of its tendency to injure the public as well as because of the specific statutory prohibition against it.

Under these circumstances it is the policy of the courts to render no assistance to either party in connection with such transactions but to leave them where it finds them. Such contracts are "*generally unenforceable by any remedy.*"

In *Norbeck & Nicholson Company* v. *State of South Dakota,* 32 S. D. 189, the Court at page 198, says:

> "Illegality of contract, arising from express prohibition of law based on public policy, renders the contract wholly null and void for any purpose, and precludes a recovery on an implied contract or on the *quantum meruit;* otherwise a means would be thereby furnished for the undoing of the law itself."

And further says:

> "The general rule is that illegal contracts—illegal by reason of being expressly prohibited by law—are unenforceable, and no one can acquire any legal right under such a contract. If one of the parties has performed in whole or in part he cannot avoid the con-

> tract and recover from the adversary party a reasonable compensation for such performance. No right, therefore, arises out of an illegal transaction even on the theory of constructive contracts. The law leaves the parties to illegal contracts where it finds them, and gives them no assistance in extricating themselves from the situation in which they have placed themselves—no recovery can be had for services rendered thereunder, either on the express contract, or on an implied contract, or on *quantum meruit.*"

In *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, the Court at page 412, says:

> "The question is not one involving want of authority to contract on account of irregularity of organization or lack of affirmative grant of power in the charter of a corporation, but a question of the absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared 'utterly null and void.'
>
> 'The rule of law,' said Parker, C. J., in *Russell* v. *DeGrand,* 15 Mass. 35, 39 'is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain.'
>
> We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be affirmed."

In *M. Hunter* v. *Pearl L. Wheate,* 31 A. L. R. 980 (289 Fed. 604), the Court at pages 982 and 983, says:

> "It has long been the law that, where an action is founded upon an unlawful contract, the court will not interfere to relieve either of the parties thereto, in an action against the other, from the results thereof. In *Higgins* v. *McCrea,* 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557, it was said: 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the

court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it.'

This was quoted from an earlier case. The authorities in support of this proposition are numerous, and only a few are referred to: *McMullen* v. *Hoffman,* 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.,* 212 U. S. 227, 53 L. Ed. 486, 29 Sup. Ct. Rep. 280; 1 C. J. 958.

This rule applies, whether the act is performed in the execution of a contract or not. In other words, it applies to transactions as well as to contracts, and hence the suggestion of appellee that the recovery here was upon the second count in the declaration as for a tort, regardless of the contract, is of no avail. If the act out of which the cause of action arises is immoral or illegal, the courts will not grant relief. *The Florida,* 101 U. S. 37, 25 L. Ed. 898; *Riggs* v. *Palmer,* 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Levy* v. *Kansas City,* 22 L. R. A. (N. S.) 862, 93 C. C. A. 523, 168 Fed. 524. In the last-cited case, opinion by Sanborn, J., the authorities are exhaustively examined. It was said: 'But the maintenance of actions to recover moneys or property lost, or damages sustained, through transactions or contracts wherein the plaintiffs were guilty of moral turpitude, or of the violation of a general law passed to effectuate a public policy, is prohibited by this rule, as well as the maintenance of actions upon contracts of that nature.' "

In *Charles W. Flack, et al.* v. *John S. Warner, et al.,* 278 Ill. 368, the Court at page 375, says:

"This is a chancery proceeding. 'In general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala In se,* courts of equity, following the rule of law as to participators in a common crime, will not, at present, interpose to grant any relief.' (*Miller* v. *Marckle,*

> *supra*, p. 154.) 'It is a principle of equity that where a contract is illegal, immoral or against public policy, or has been entered into through fraud or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the parties, a *particeps doli*, while the agreement is still executory, either compel its execution or decree its cancellation, nor, after it has been executed, set it aside, and thus restore the plaintiff to the property or other interest which he has fraudulently or illegally transferred. Equity will leave such parties exactly in the position in which they have placed themselves, refusing all affirmative aid to any of the participants."

In *Ernest J. Seitz* v. *Theodore Michel* (Minn. Supreme Ct.), 181 N. W. 102, 12 A. L. R. 1060, the Court at page 1067, says:

> "A court will not directly enforce a contract or recognize it by awarding damages for its breach if it is contrary to public policy, but will leave the parties where it finds them, not out of consideration for the rights of either, but because the contract is injurious to or contravenes some interest of society or of the state. *Adams* v. *Adams*, 25 Minn. 72; *Peterson* v. *Christenson*, 26 Minn. 377, 4 N. W. 623; *Boyle* v. *Adams*, 50 Minn. 255, 17 L. R. A. 96, 52 N. W. 860; *Holland* v. *Sheehan*, 108 Minn. 362, 23 L. R. A. (N. S.) 510, 122 N. W. 1, 17 Ann. Cas. 687; *Buck* v. *Walker*, 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882; Dunnell's Dig. 1885."

Cases cited by petitioner do not involve transactions which were violative of public policy and specifically prohibited by law. They are based upon unjust enrichment arising from acts which while *ultra vires* were not of a nature injurious to the public. However, there is in this record no evidence of benefits received by the defendant growing out of the *ultra vires* agreement.

In the trial of this case the plaintiff offered no evidence of the amount of any benefit accruing to the bank from the sale of the bonds. The bonds were not the obligations of the bank, they were the obligations of another corporation, "The First National Company," and the only benefit the defendant bank could have gained was any sum in the nature of a commission or profit for handling the bonds. If the bonds had been the obligation of the bank which because of some defect were void, the bank would have received money for which nothing of value was given in return. But such was not the case. The bonds were purchased by the bank with its own funds and this purchase and the subsequent sale to the plaintiff and the payment by the plaintiff of the purchase price taken alone was a valid transaction. It was only the repurchase agreement that was void for illegality.

The bank cases cited were all decided prior the 1927 Amendment to the National Bank Act and permitted recovery only for unjust enrichment arising out of the *ultra vires* transactions, such as money borrowed and received by the bank through the unauthorized action of an officer; money actually obtained by the bank as the result of a guaranty beyond the power of the bank; coin bought in behalf of the bank by the cashier without authority of the bank but within the power of the corporation and profit actually made from the repudiated agreement of the bank in purchasing bonds. The case of *Coon* v. *Smith,* was a decision of the Federal District Court and was based largely upon the first decision of the *Awotin* case which was subsequently reversed.

B.

The purpose of the limitation restricting the sale of investment securities to sales made "without recourse" was the protection of the public at large from widespread bank failures as well as for the protection of the depositors and stockholders of the bank; this purpose would not be fulfilled by granting substantially the same relief under the common counts as is denied under the illegal contract.

As is pointed out in the case of *Knass* v. *Madison & Kedzie State Bank,* 354 Ill. 559, the serious danger arising from these repurchase agreements is the contingent liability to which the bank is subjected. Against this liability the bank is powerless to take the necessary steps for its protection, the maturing of these agreements at or about the same time by a large number of purchasers may bring about the complete destruction of the banking institution and prevent the performance of its functions as an agency of the federal government as well as great loss to depositors and stockholders who rightfully rely upon government inspections and regulations for their protection.

The purpose of the limitation of the National Bank Act restricting the sale of investment securities to sales "without recourse" is the prevention this contingent liability and the protection of the public as well as of depositors and stockholders. This purpose would not be accomplished by the courts if they granted substantially the same relief under an implied contract as they denied under the illegal contract. In the *Knass* case it is said that "the law does not prohibit and also enforce a contract."

The case of *Cassatt, et al.* v. *First National Bank of West New York,* 168 Atl. 585, is a recent decision by the New Jersey Court of Errors and Appeals and is also reported in the last volume of American Law Reports Annotated, recently issued, at page 1302 (89 A. L. R. 1302). This case involved the right of a national bank to purchase stock in another corporation, and in that connection the Court considered the 1927 amendment to the National Bank Act. The Court held against such power. In its discussion of the issues involved the Court gave attention to a question similar to the one here involved.

The Court there says (89 A. L. R. 1307):

> "This leads us to approve of the argument of the respondent, that, 'It is a contradiction in terms to say that a national bank which has no power whatsoever, under the law, to purchase speculative securities directly may, nevertheless, make itself liable as a purchaser, by acting as an agent, for a customer of the bank. Such a conclusion would nullify the purpose of the statutory limitation upon its powers, which is to conserve the rights of its depositors and stockholders and enable it to perform, unimpaired, its functions as an agency of the federal government.' "

The Court further says on page 1308:

> "Further, that persons dealing with national banks are charged with notice of their limitations, citing *McCormick* v. *Market National Bank*, 165 U. S. 538, 550, 17 S. Ct. 433, 41 L. Ed. 817, and *California Bank* v. *Kennedy, supra.* This also is undoubtedly so."

The opinion was concurred in by all fifteen judges participating in the hearing and a petition for writ of certiorari was denied by the Supreme Court of the United States on January 15, 1934. (291 U. S. 660.)

When the object to be accomplished is in violation of public policy the courts do not hesitate in denying relief even though the contract sought to be enforced is not illegal.

In *Henry H. Ingersoll, et al.* v. *Coal Creek Coal Company, et al.*, 117 Tenn. 263 (98 S. W. 178) 9 L. R. A. 282, the Court at page 294 of L. R. A., says:

> "It is insisted that the contracts made are not illegal. This, we think, does not reach the root of the case, as the contracts themselves, abstractly considered, may be legal; and yet there may be circumstances surrounding their making which would deter the courts from enforcing them, or rights based on them, when all the facts are divulged and the nature of the consideration appears."

CONCLUSION.

We have shown that this Court is without jurisdiction to issue the writ of certiorari herein because the discretion of the Supreme Court of Illinois as to whether it should review the judgment of the Appellate Court was never properly invoked, and because there is no affirmative showing as to the method by which it was sought to invoke such discretion. We have also shown that petitioners claim based solely upon an implied promise to repay money had and received does not involve the assertion of a right under the National Bank Act and is not a federal question; that this claim arising out of a transaction prohibited by law and against public policy can give rise to no enforcible obligation, particularly in the absence of any benefits received therefrom by Respondent.

We, therefore, ask that petitioners' prayer for the issuance of the writ of certiorari be denied.

Respectfully submitted,

Daniel M. Healy,
Attorney for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 662

ROSE KIMEN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO,
a corporation,

Respondent.

ON WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

IMPLIED ASSUMPSIT.

A.

The repurchase agreement was against public policy and prohibited by statute, of which plaintiff was chargeable with notice. The courts will not give assistance to either party to such transactions but will leave them where it finds them.

Petitioner's specifications of error do not question the correctness of the holding by the Appellate Court of Illinois that the repurchase agreement "is beyond the powers of defendant bank to make *and is void upon the ground of public policy*" (R. 79), but on the contrary they accept without objection the finding and holding of that court that the repurchase agreement is *ultra vires* and void under the National Bank Act and assign error only on the refusal of that court to permit recovery on an implied assumpsit.

In considering this question of the right of recovery on an implied assumpsit, it becomes necessary to determine the reason for the invalidity of the contract. If the repurchase agreement was in disobedience of some positive provision of law or against public policy, the law would not give any assistance to the parties, either on the express contract or on an implied one.

The Appellate Court of Illinois very clearly based its decision, of the invalidity of the repurchase agreement, upon the fact that it was contrary to public policy and in violation of the National Bank Act. It was provided by an amendment of that act made in 1927 that the business of the bank in buying and selling investment securities,

> "Shall hereafter be limited to buying and selling without recourse marketable obligations,"

and it was held by the court that there was a violation of this provision, when the bank in connection with the sale of the bonds involved, entered into the repurchase agreement obligating itself to buy back at maturity the bonds at par and accrued interest if the purchaser should then so desire.

The Appellate Court of Illinois in coming to this conclusion, followed the decision of the Supreme Court of Illinois in the recent case of *Knass* v. *Madison and Kedzie Bank,* 354 Ill. 554. The Supreme Court of Illinois, in that case, had before it for determination the question of the validity of repurchase agreements given by a state bank in connection with the sale by the bank of real estate mortgage bonds.

The court there held that the repurchase agreements amounted to a guaranty of the bonds and was not a power granted by the statute under which the bank was organized but was contrary to the express provisions of an act for the protection of bank depositors which provided that it should not be lawful for banks to assume the payment of, or guaranty the payment of, notes, bonds or other evidence of indebtedness of any person, company or incorporation. The court further held that these repurchase agreements created a contingent liability which could not be measured and determined in prospect or accurately reported to public officers whose duty it was to ascertain the condition of the bank; that a shrinkage in the value of the bonds might destroy the safety of deposits and trust funds and cause the entire destruction of the banking institution itself; that these repurchase agreements, because of their tendency to injure the public and destroy the well-being of banks, which are quasi-public institutions, were against public policy; and that these contracts being against public policy and prohibited by law can in no manner be enforced as the law does not prohibit and also enforce a contract.

The only difference between the "Knass" case and the case at bar lies in the fact that the Knass case involved a State bank and State statutes, while the case at bar involved a national bank and Federal Statutes. The powers granted in both cases are substantially the same. The public policy of the state and of the nation as indicated by the acts of the State legislature and of Congress are the same and the reasons for giving protection to the public and to national banks as agencies of the government are equally as strong as those requiring protection to the public and State banks as quasi public institutions.

Repurchase agreements such as are here involved were held to be against public policy in *Greene* v. *First National Bank,* 172 Minn. 310. In that case the court said:

> "But a guaranty of commercial paper sold by a bank and a contract to repurchase real estate mortgages which the bank has sold stand on a different footing. As was said in *Eberlein* v. *Stockyards Mortg. & T. Co., supra,* to agree to repurchase on demand, and at face value securities the bank sells subjects it to a contingent liability, the sudden maturing of which, by the concurring demands of a large number of purchasers, may easily absorb its capital instantaneously. Paraphrasing the language of *Farmers' & M. Sav. Bank* v. *Crookston State Bank, supra,* it may be said that every bank is charged with duties to the public. A bank is more than a mere private corporation for pecuniary profit. A national bank is under the supervision of the federal authorities. A contract to repurchase real estate mortgages which the bank has sold is in defiance of safe banking, tends to injure the depositors of the bank, and is contrary to public policy."

The cases to which reference is made in the above quotation are reported as follows:

> *Eberlein* v. *Stockyards Mortgage and Trust Co.,* 164 Minn. 323.
>
> *Farmers & M. Savings Bank* v. *Crookston Bank,* 169 Minn. 249.

It thus appears that the repurchase agreement in question is against public policy and illegal both because of its tendency to injure the public as well as because of the specific statutory prohibition against it.

Under these circumstances it is the policy of the courts to render no assistance to either party in connection with such transactions but to leave them where it finds them.

Such contracts are, as is said in the "Knass" case, *"generally unenforceable by any remedy."*

In *Norbeck & Nicholson Company* v. *State of South Dakota,* 32 S. D. 189, the Court at page 198, says:

> "Illegality of contract, arising from express prohibition of law based on public policy, renders the contract wholly null and void for any purpose, and precludes a recovery on an implied contract or on the *quantum meruit;* otherwise a means would be thereby furnished for the undoing of the law itself."

And further says:

> "The general rule is that illegal contracts—illegal by reason of being expressly prohibited by law—are unenforceable, and no one can acquire any legal right under such a contract. If one of the parties has performed in whole or in part he cannot avoid the contract and recover from the adversary party a reasonable compensation for such performance. No right, therefore, arises out of an illegal transaction even on the theory of constructive contracts. The law leaves the parties to illegal contracts where it finds them, and gives them no assistance in extricating themselves from the situation in which they have placed themselves—no recovery can be had for services rendered thereunder, either on the express contract, or on an implied contract, or on *quantum meruit."*

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We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be affirmed."

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> "It has long been the law that, where an action is founded upon an unlawful contract, the court will not interfere to relieve either of the parties thereto, in an action against the other, from the results thereof. In *Higgins* v. *McCrea,* 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557, it was said: 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it.'
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> This was quoted from an earlier case. The authorities in support of this proposition are numerous, and only a few are referred to: *McMullen* v. *Hoffman,* 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.,* 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; 1 C. J. 958.
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> This rule applies, whether the act is performed in the execution of a contract or not. In other words, it applies to transactions as well as to contracts, and hence the suggestion of appellee that the recovery here was upon the second count in the declaration as for a tort, regardless of the contract, is of no avail. If the act out of which the cause of action arisis is immoral or illegal, the courts will not grant relief.

> *The Florida,* 101 U. S. 37, 25 L. Ed. 898; *Riggs* v. *Palmer,* 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Levy* v. *Kansas City,* 22 L. R. A. (N. S.) 862, 93 C. C. A. 523, 168 Fed. 524. In the last-cited case, opinion by Sanborn, J., the authorities are exhaustively examined. It was said: 'But the maintenance of actions to recover moneys or property lost, or damages sustained, through transactions or contracts wherein the plaintiffs were guilty of moral turpitude, or of the violation of a general law passed to effectuate a public policy, is prohibited by this rule, as well as the maintenance of actions upon contracts of that nature.'"

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> is contrary to public policy, but will leave the parties where it finds them, not out of consideration for the rights of either, but because the contract is injurious to or contravenes some interest of society or of the state. *Adams* v. *Adams,* 25 Minn. 72; *Peterson* v. *Christenson,* 26 Minn. 377, 4 N. W. 623; *Boyle* v. *Adams,* 50 Minn. 255, 17 L. R. A. 96, 52 N. W. 860; *Holland* v. *Sheehan,* 108 Minn. 362, 23 L. R. A. (N. S.) 510, 122 N. W. 1, 17 Ann. Cas. 687; *Buck* v. *Walker,* 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882; Dunnell's Dig. 1885."

Cases cited by petitioner do not involve transactions which were violative of public policy and specifically prohibited by law. They are based upon unjust enrichment arising from acts which while *ultra vires* were not of a nature injurious to the public. However, there is in this record no evidence of benefits received by the defendant growing out of the *ultra vires* agreement.

In the trial of this case the plaintiff offered no evidence of the amount of any benefit accruing to the bank from the sale of the bonds. The bonds were not the obligations of the bank, they were the obligations of another corporation, "The First National Company,' 'and the only benefit the defendant bank could have gained was any sum in the nature of a commission or profit for handling the bonds. If the bonds had been the obligation of the bank which because of some defect were void, the bank would have received money for which nothing of value was given in return. But such was not the case. The bonds were purchased by the bank with its own funds and this purchase and the subsequent sale to the plaintiff and the payment by the plaintiff of the purchase price taken alone was a valid transaction. It was only the repurchase agreement that was void for illegality.

This partial illegality of the transaction should not affect the remaining portion. The petitioner purchased and received the bonds and paid therefor presumably the then market value thereof, and if she had so elected could have then sold the same without loss.

The rule stated in 6 Ruling Case Law 815 is as follows:

> "It is perfectly well settled that where one provision in a contract which does not constitute its main or essential feature or purpose, is void for illegality, or otherwise, but is clearly separable and severable from the other parts which are relied upon, such other parts are not affected by the invalid provision, and may be enforced as if no such provision had been incorporated into the contract."

To the same effect is *Western Union Telegraph Company* v. *Pennsylvania Co.*, 129 Fed. 849.

It is stated in Corpus Juris, Vol. 14a, at page 316, as follows:

> "Contracts by corporation may be valid in so far as it is within its power and void in so far as it transcends its power."

In *Illinois T. & S. Bk.* v. *Pacific Ry. Co.*, 117 Calif. 332, on page 343, it is said:

> "Granting that it was *ultra vires* of the Pacific Railway Company to mortgage the property of the cable railway company, it was still *intra vires* for it to borrow money and issue evidence of indebtedness; this is not disputed; consequently its bonds were not invalidated by the want of power to make the mortgage by which they were in terms secured."

Counsel for petitioner have cited a number of decisions in support of their position that the respondent is liable upon an implied assumpsit, but these cases do not involve transactions which were violative of public policy and specifically prohibited by law.

They have cited in this connection the two cases involving the Central Transportation Company and the Pullman Car Company, one reported at 139 U. S. 24 and the other at 171 U. S. 138. These two cases arose out of an *ultra vires* lease from the Central Transportation Company to the Pullman Car Company. The first suit was a suit started by the Central Transportation Company to recover rent under the lease. The second suit was a suit by the Pullman Car Company in which it sought to enjoin the Central Transportation Company from instituting further suits for rent under the lease, and in its bill of complaint it acknowledged that the leases were *ultra vires* and tendered a return of the property received under the lease, and offered to make compensation for such other property as could not be returned.

In the first case it was held that the lease was *ultra vires* because it was beyond the powers conferred upon the Central Transportation Company by the legislature, and that there could be no recovery on the contract. The court there indicated, however, that while refusing to maintain any action upon an unlawful contract the law would permit property or money parted with on the faith of the unlawful contract to be recovered back or compensation made for it, and in concluding the opinion the Court said on page 61:

> "The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule 'stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;' and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.' *Pennsylvania Railroad* v. *St. Louis & C. Railroad*, 118 U. S. 317."

It will be noted that it is left open for the court to determine apparently from the circumstances and the nature of the *ultra vires* act "whither it will interfere as the matter stands."

An examination of the opinion in the second case shows that the court recognized the distinction between *ultra vires* acts that were merely in excess of the power granted and acts that were contrary to public policy and prohibited by law. The court in 171 U. S. at page 149, refers to the first decision and states that therein "the contractor's lease was held to be unlawful and void because it was beyond the powers conferred upon the Central Transportation Company by the legislature and because it involved an abandonment by that company of its duty to the public. *It was added that there was strong ground also for holding that the contract between the parties was void because in unreasonable restraint of trade and therefore contrary to public policy.*"

It is therefore apparent that the holding of *ultra vires* was not based upon the contract being contrary to public policy, although there were strong grounds for such a finding. Later in the opinion, at page 151, the court says:

> "The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The cases upholding this doctrine are numerous and emphatic. Indeed there is really no dispute concerning it. But the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. * * * The right to a recovery of property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it * * *. The right of recovery must rest upon a disaffirmance of the contract and it is permitted only because of the desire of the courts to do justice as far as possible to the party

> who has made payment or delivered property under a void agreement and which in justice he ought to recover, *but courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principle of public policy already noticed.*"

Another case cited by petitioner is that of *Logan County National Bank* v. *Townsend,* 139 U. S. 67. This case was decided long before the 1929 amendment was added to the National Bank Act, and holds that where a bank buys stock under an *ultra vires* resale agreement that the seller may rescind the contract by tendering back the purchase price. But here again the court recognized the distinction between a power which is not expressly given to a bank and one which is expressly prohibited. With reference to this the court at page 71 says:

> "Probably according to a fair construction of the national bank act, the power is not expressly given to appellant to purchase and deal in bonds of the character in question; but neither is it expressly prohibited by the act to do so, and there is a proper and well recognized difference between 'the case of an engagement made by a corporation to do an act expressly prohibited by its charter or some other law and a case where legislative power to do the act has not been granted.'"

The case of *Aldrich* v. *Chemical National Bank,* 176 U. S. 618, permitted recovery for money borrowed and received by the bank through the unauthorized action of its vice-president, and the case of *Citizens' Central National Bank* v. *Appleton,* 216 U. S. 116, upheld a recovery from the bank of money actually received by the bank without any consideration other than a guaranty of the bank beyond the powers conferred. The recovery in neither of these cases was based upon the exercise by the bank of a power expressly prohibited. The case of *Coon* v. *Smith,* 4 Fed. Supp. 960, was a decision of the Federal District Court in Illinois and followed the first decision of the Illinois Appellate Court in the "*Awotin*" case, which was subsequently reversed by the decision now being reviewed.

B.

The purpose of the limitation restricting the sale of investment securities to sales made "without recourse" was the protection of the public at large from widespread bank failures as well as for the protection of the depositors and stockholders of the bank; this purpose would not be fulfilled by granting substantially the same relief under the common counts as is denied under the illegal contract.

As is pointed out in the case of *Knass* v. *Madison & Kedzie State Bank,* 354 Ill. 559, the serious danger arising from these repurchase agreements is the contingent liability to which the bank is subjected. Against this liability the bank is powerless to take the necessary steps for its protection. The maturing of these agreements at or about the same time by a large number of purchasers may bring about the complete destruction of the banking institution and prevent the performance of its functions as an agency of the federal government as well as great loss to depositors and stockholders who rightfully rely upon government inspections and regulations for their protection.

The purpose of the limitation of the National Bank Act restricting the sale of investment securities to sales "without recourse" is the prevention of this contingent liability and the protection of the public as well as of depositors and stockholders. This purpose would not be accomplished by the courts if they granted substantially the same relief under an implied contract as they denied under the illegal contract. In the *Knass* case it is said that "the law does not prohibit and also enforce a contract."

The case of *Cassett, et al.* v. *First National Bank of West New York,* 168 Atl. 585, is a recent decision by the New Jersey Court of Errors and Appeals and is also reported in Volume 89 of American Law Reports Annotated, recently isued, at page 1302 (89 A. L. R. 1302). This case involved the right of a national bank to purchase stock in another corporation, and in that connection the Court considered the 1927 amendment to the National Bank Act. The Court held against such power. In its discussion of the issuse involved the Court gave attention to a question similar to the one here involved.

The Court there said (89 A. L. R. 1307):

> "This leads us to approve of the argument of the respondent, that, 'It is a contradiction in terms to say that a national bank which has no power whatsoever, under the law, to purchase speculative securities directly may, nevertheless, make itself liable as a purchaser, by acting as an agent, for a customer of the bank. Such a conclusion would nullify the purpose of the statutory limitation upon its powers, which is to conserve the rights of its deositors and stockholders and enable it to perform, unimpaired, its functions as an agency of the federal government.' "

The Court further says on page 1308:

> "Further, that persons dealing with national banks are charged with notice of their limitations, citing *McCormick* v. *Market National Bank,* 165 U. S. 538, 550, 17 S. Ct. 433, 41 L. Ed. 817, and *California Bank* v. *Kennedy, supra.* This also is undoubtedly so."

The opinion was concurred in by all fifteen judges participating in the hearing and a petition for writ of certiorari was denied by the Supreme Court of the United States on January 15, 1934. (291 U. S. 660.)

When the object to be accomplished is in violation of public policy the courts do not hesitate in denying relief even though the contract sought to be enforced is not illegal.

In *Henry H. Ingelsoll, et al.* v. *Coal Creek Coal Company, et al.*, 117 Tenn. 263 (98 S. W. 178), 9 L. R. A. 282, the Court at page 294 of L. R. A., says:

> "It is insisted that the contracts made are not illegal. This, we think, does not reach the root of the case, as the contracts themselves, abstractly considered, may be legal; and yet there may be circumstances surrounding their making which would deter the courts from enforcing them, or rights based on them, when all the facts are divulged and the nature of the consideration appears."

It is suggested by attorney for petitioner that the creation of such contingent liabilities is not necessarily dangerous, as the bank might protect itself by establishing "*a reserve against the maturity of such liability.*" The fact alone that transactions of this character would make necessary such a reserve is a sufficient inducement for the action taken by Congress. The necessity of placing the proceeds of all bonds so sold in a reserve fund awaiting the maturity of the bonds would hardly commend itself as good or safe banking. It would require that large sums of the bank's capitad remain tied up and unused for long periods of time, and make their eventual availability as assets of the bank dependent upon the value of investment securities at the date of their maturity. It would be speculating on future values with no chance of gain.

CONCLUSION.

We have by the foregoing brief presented our reasons for believing that the petitioner should not under the law recover in her action. We have shown that the transaction out of which her claim grows is void as being injurious to the public and prohibited by law; that the illegality affects only a portion of the transaction; that there is in the record no showing of any benefits derived by the respondent from the sale of the bonds involved; that the petitioner's claim, based solely upon an implied promise, and arising out of a transaction prohibited by law and against public policy, can give right to no enforcible obligation, and that to allow the relief sought would furnish a means for the undoing of the law prohibiting the repurchase agreement.

We therefore respectfully submit that the judgment of the Appellate Court of Illinois, First District, should be affirmed.

Respectfully submitted,

Daniel M. Healy,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 662.—October Term, 1934.

Rose Kimen, Petitioner, *vs.* Atlas Exchange National Bank of Chicago.	On Writ of Certiorari to the Appellate Court, First District, State of Illinois.

[April 29, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This case, which comes here on certiorari, — U. S. —, to the Appellate Court of Illinois, First District, is a companion case to No. 661, *Awotin* v. *Atlas Exchange National Bank of Chicago*, decided this day.

On November 2, 1929, petitioner purchased of respondent, a national banking association, four $1,000 mortgage bonds of the First National Company Collateral Trust. As an inducement and consideration for the purchase, the respondent agreed to repurchase the bonds at their maturity, at par and accrued interest. In a suit brought by petitioner, to recover for breach of the contract and in general assumpsit to recover the purchase price of the bonds, the trial court gave judgment for petitioner, which was reversed by the Appellate Court, 275 Ill. App. 638 (opinion not reported), following its decision in *Awotin* v. *Atlas Exchange National Bank*, *supra.* The Supreme Court of the State denied leave to appeal. The issues raised are the same as those in the *Awotin* case. For the reasons stated in our opinion in that case, the judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.